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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~810~~ 38.

RAILWAY EXPRESS AGENCY, INCORPORATED,  
APPELLANT,

vs:

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE  
COMMONWEALTH OF VIRGINIA

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FILED FEBRUARY 26, 1958

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[fol. 1]

**IN THE SUPREME COURT OF APPEALS  
OF VIRGINIA AT RICHMOND**

Record No. 4742

**RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,**  
against  
**COMMONWEALTH OF VIRGINIA, Appellee.**

From the State Corporation Commission.

**ORDER AWARDING APPEAL—April 24, 1957**

Upon the petition of Railway Express Agency, Incorporated, an appeal of right is awarded it from an order entered by the State Corporation Commission on the 1st day of March, 1957, in a certain proceeding then therein depending under the style of: Petition of Railway Express Agency, Incorporated, for correction of assessment of a Franchise Tax for the year 1956, and for a refund of such Franchise Tax; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the state Corporation Commission in the penalty of five hundred dollars, with condition as the law directs.

[fol. 2] **BEFORE THE STATE CORPORATION COMMISSION**

**PETITION OF RAILWAY EXPRESS AGENCY, INCORPORATED (FOR  
CORRECTION OF ASSESSMENT OF A FRANCHISE TAX FOR THE  
YEAR 1956, AND FOR A REFUND OF SUCH FRANCHISE TAX)**

**To the Honorable, The State Corporation Commission of  
Virginia:**

Railway Express Agency, Incorporated, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 219 East 42nd Street, New York, New York, respectfully presents [fol. 3] this Petition pursuant to the provisions of Section

58-672 of the Code of Virginia (1950), and represents to your Honorable Body as follows:

1. That is (sic) is engaged in the handling and transportation of goods, wares and merchandise in express service by means of railway cars, motor trucks and airplanes in each of the States of the United States, including the State of Virginia, in which it sought but was denied authority by this Honorable Body on April 8, 1929, to transact such business in *intrastate commerce* in this State.

2. That pursuant to the opinion of the Supreme Court of Appeals of Virginia (153 Va. 498) affirming the foregoing decision of your Honorable Body, your Petitioner caused Railway Express Agency, Incorporated, of Virginia to be organized under the laws of this State on October 20, 1931, for the purpose of conducting express service in intrastate commerce in this State, and that corporation, as a wholly owned subsidiary of your Petitioner, has since 1932 conducted the intrastate express business in Virginia theretofore conducted by your Petitioner.

3. That Railway Express Agency, Incorporated, of Virginia has since 1933 reported to your Honorable Body, been assessed with and has paid annually all taxes on property and money used and employed by it in intrastate commerce in this State, including a license tax for the years 1933 to 1955, inclusive (for the privilege of doing business in this State) based on its gross receipts from operations in this State, as required by the then provisions of Section 58-547 and its antecedent sections of the Tax Code of Virginia. That the said Virginia Company has also paid the property taxes and a franchise tax for the current year (1956) in the amount of \$13,173.38, based upon its gross receipts from operations in this State in the year 1955 in the amount of \$612,715.55, pursuant to the requirements of Section 58-547 of the Code, as amended March 31, 1956 (Acts 1956, page 964).

4. That your Petitioner has since 1930 reported to your Honorable Body and been assessed with and has paid annually all taxes on property and money used and employed by it in its interstate commerce in this State, and has likewise



reported, under protest, been assessed with, in the manner hereinafter stated, and has paid annually until 1953, under protest, a license tax (for the privilege of doing business in this State), allegedly based on its gross receipts from business beginning and ending within this State and on all receipts earned in this State on business passing through, into and out of this State, as required by the then provisions [fol. 4] of Section 58-547 of the Tax Code of Virginia.

Such license taxes paid by your Petitioner for the years 1950 to 1953, inclusive, were later refunded by order of this Honorable Commission, pursuant to the judgment of the Supreme Court of the United States in *Railway Express Agency, Inc. v. Commonwealth of Virginia* (April 5, 1954), 347 U.S. 359. Your Petitioner has also paid, under protest, on September 26, 1956, a franchise tax for the current year 1956 in the amount of \$139,739.66 based on its gross receipts of \$6,499,519.00, allegedly derived from business beginning and ending within this State and on all such receipts earned in this State on business passing through, into and out of this State during the year 1955, as required by Section 58-547 of the Tax Code, as amended March 31, 1956 (Acts 1956, page 947).

5. That the legality, manner of determining and amount of the license and/or franchise taxes assessable annually against your Petitioner, under authority of Section 58-547 and its antecedent sections of the Code of Virginia and under authority of Section 58-547 as amended by the Act of March 31, 1956, have been the subject of frequent hearings, formal and informal, before your Honorable Body, with the result that various methods and formulae for determining the gross receipts of your Petitioner subject to assessment in this State, and the amount of license and/or franchise taxes annually to be imposed thereon, have not been uniform or strictly within the requirements of the aforesaid sections of the Tax Code of Virginia, and, while accepting the various assessments annually made against it in this respect by your Honorable Body and while paying the license and/or franchise taxes annually imposed against it in pursuance of such assessments, allegedly under authority of the aforesaid Section 58-547 and its antecedent sections

of the Code of Virginia, and under authority of Section 58-547 as amended by the Act of March 31, 1956, your Petitioner has consistently denied liability therefor, and has paid all such taxes so imposed upon it under protest. The form of protest accompanying the annual report by your Petitioner to your Honorable Body of its gross receipts "on business passing through, into or out of this State" during the year 1955, was as follows:

"This Company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into or out of this State'. Such [fol. 5] receipts, if otherwise ascertainable, would not be subject to franchise taxation in Virginia, however, since they are derived solely from interstate commerce and the provisions of Section 58-546 (as amended by the Act of March 31, 1956, Acts 1956, Chapter 612) making such a tax 'in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock', are, as to it, unconstitutional and void, in that the franchise tax imposed by Section 58-547 (as similarly amended) upon such gross interstate receipts, if otherwise ascertainable, would be in excess of what would be legitimate, in a constitutional sense, as an ordinary property tax upon such intangible property and rolling stock."

The remittance made by Petitioner of \$139,739.66 to the Treasurer of the State of Virginia on account of the franchise tax so imposed against it for the year 1956 was expressly made "Paid Under Protest" as shown on the endorsement on the back of the draft covering that remittance.

6. That since the business of your Petitioner in the carrying of goods, wares and merchandise in express service over lines of railroads, aircraft and motor carriers operating in this State is wholly interstate in character, gross receipts derived therefrom are not subject to taxation under and by virtue of the laws of the State of Virginia, and the franchise tax sought to be imposed thereon by Section 58-547 of the Code, as amended as aforesaid, is therefore unconstitutional, null and void in that it is sought to be imposed upon the *right* and *privilege* of your Petitioner to do



an interstate express business in this State, and constitutes a direct burden upon such commerce and a tax upon your petitioner for the *privilege* of engaging therein, in contravention of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States; that if considered a property tax upon the "good will", "use" or "going concern" value of the business of your Petitioner done in Virginia, although made "in lieu" of any state tax upon its intangible property and rolling stock, such franchise tax would also deprive your Petitioner of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States, since the business of your Petitioner has no such "good will", "use" or "going concern" value in the State of Virginia and the tax of \$139,739.66 imposed thereon is greatly in excess of what would be a legitimate tax upon the property "in lieu" of which the aforesaid franchise tax is sought to be imposed.

[fol. 6] Wherefore, your Petitioner respectfully prays that the assessment against it by your Honorable Body of a franchise tax for the year 1956, in the amount of \$139,739.66, may be reviewed and corrected, and held to be invalid, null and void, and that the said 1956 assessment may be expunged and removed from the public records, and that the State Comptroller be directed and required to draw a warrant in favor of your Petitioner on the Treasurer of the State of Virginia, pursuant to the statutes of the State of Virginia in such cases made and provided; in the amount of \$139,739.66, with interest thereon from the date of payment, in refund of the tax so paid by Petitioner.

And your Petitioner will ever pray, etc.

Railway Express Agency, Incorporated. By Robert C. Hendon, Vice President.

Thomas B. Gay, W. H. Waldrop, Jr., Attorneys.

*Duly sworn to by Robert C. Hendon, jurat omitted in printing.*

**[fol. 7] BEFORE THE STATE CORPORATION COMMISSION****ORDER RE HEARING—October 18, 1956**

For correction of assessment of a franchise tax for the year 1956 and for a refund of such tax.

On October 18, 1956 came Railway Express Agency, Incorporated; a foreign public service corporation, by Thomas B. Gay, its counsel, and pursuant to §58-672 filed its application for correction and refund of the franchise tax in the amount of \$139,739.66 assessed against it by the State Corporation Commission for the year 1956 and paid by it under protest to the Treasurer of Virginia on September 26, 1956, together with interest thereon from the date of payment.

It Is, Therefore Ordered:

(1) That this proceeding be instituted, assigned Case No. 13233, docketed and set for hearing at 10:00 A. M. on December 17 and 18, 1956 in the Courtroom of the State Corporation Commission, State Office Building, Richmond, Virginia in accordance with the provisions of §58-673 of the Code; and,

(2) That a copy of the petition filed herein and an attested copy of this order be sent to the Attorney General of the Commonwealth as and for the notice required to be given by §58-673 of the Code and two attested copies be sent to counsel for the applicant and one attested copy to the Director of the Division of Public Service Taxation of the Commission.

A True Copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

[fol. 8] BEFORE THE STATE CORPORATION COMMISSION

**Transcript of Hearing of December 17, 1956**

Present: Commissioners W. Marshall King (Chairman),  
H. Lester Hooker, Ralph T. Catterall.

(Commissioner Catterall presiding.)

**APPEARANCES**

Thomas B. Gay, Robert J. Fletcher, H. M. Pasco, and  
W. H. Waldrop, Jr., Counsel for Railway Express Agency,  
Incorporated.

Frederick T. Gray and Clarence F. Hicks, Assistant At-  
torneys General for the Commonwealth.

Norman S. Elliott, Counsel for State Corporation Com-  
mission.

Commissioner Catterall: All right, Mr. Gay, you may  
proceed.

Mr. Gay: I don't think it is necessary for me to make  
any opening statement about this matter, unless the Com-  
mission desires it. I think the Commission is familiar with  
this proceeding. It is an effort to correct the franchise tax  
on the petitioner, the Railway Express Agency, a Delaware  
corporation, for the year 1956, pursuant to the assessment  
for that year.

Commissioner Catterall: It might help us to get the point  
you make, but I assume you will file briefs?

Mr. Gay: I was going to do that, but it seems important  
to us to ask for an oral argument, and we will file with the  
Commission a copy of our brief, unless these gentlemen here  
have some other method of procedure to suggest.

Mr. Elliott: I have no method of procedure to suggest at  
this time, other than to say that I don't know what factual  
[fol. 9] matters will come before this Commission in this  
matter, but I suspect there will be a lot of complicated  
figures, and if that be the case I want to request an adjourn-  
ment of this case so as to give us an opportunity to examine  
that factual material.

Commissioner Catterall: In case they present matters  
that you are not familiar with?

Mr. Elliott: Yes.

Mr. Gay: Section 58-673 of the Code, which is one of the sections of the article of the Code under which this proceeding is being prosecuted, requires that a copy of the Petition be served on the Attorney General. I would like to file as an exhibit with Petitioner's testimony, on the theory that the point may be jurisdictional, a copy of my letter of July twenty-sixth to Mr. Elliott enclosing three copies of the Petition for the Commission, and a copy of which was sent to the Attorney General.

Commissioner Catterall: That will be received as Exhibit A.

Mr. Elliott: The order so recites.

Commissioner Catterall: That is correct; that is covered by the order, so there is no question about that.

Mr. Gay: Mr. Jump, will you take the stand.

C. J. JUMP, a witness introduced on behalf of Petitioners, being first duly sworn, testified as follows:

### Direct Examination.

By Mr. Gay:

Q. Will you please state your name and occupation.

A. My name is C. J. Jump. I am Vice President, Administration and Finance, Railway Express Agency, Incorporated, 242 East 42nd Street, New York City.

Q. How long have you been connected with the Railway Express Agency, Incorporated?

A. Since its inception on March 1, 1929, but I have had service with the American Express Company from July 1928 to February 1929, and prior to that I was with Adams Express Company from October 1910 to June 30, 1918.

Q. I take it from what you say that the business of those two other companies was taken over by the Railway Express Agency, Incorporated?

[fol. 10] A. That is right. There were several independently owned express companies back in 1917, when the railroads of the country were placed under Federal control

by executive order of the President of the United States. Their contracts were not recognized by the Director General, who indicated that he would appoint a single agency to carry on the express business of the railways of the Country, then under Federal control, if the railroads would form such a company, and out of that grew the American Express Company. It started in July 1918, succeeding to the business of the several express companies then operating.

During the 1920's, as there were various proceedings before the Interstate Commerce Commission dealing with rates, the Commission from time to time suggested that the railroads ought to own the express business, and out of that, after thorough consideration, the Railway Express Agency was organized and purchased the express properties of the American Railway Express Company and succeeded to the express business on March 1, 1929.

Q. Did you say the railroads organized this Railway Express Agency, Incorporated?

A. That is right.

Q. Did they acquire its capital stocks?

A. Eighty-six of them acquired the capital stock by a nominal payment of \$100,000. The rest of the money needed to purchase the express properties of the American Railway Express Agency was secured through a bond issuance of \$32,000,000.

Q. Have those bonds since been paid off?

A. Yes, the balance was reduced to some \$16,000,000 and the issue was refunded by an issuance of notes for \$16,000,000 and the notes were long since paid off by money advanced by the stockholders.

Q. Which were the railroads?

A. That is right.

Q. Is the business of the Express Company, the petitioners here, conducted with the railroads owning its stock under some form of standard agreement?

A. It is conducted, not only with those railroads that now own its stock, now numbering sixty-eight, but also with a considerable number of other railroads which are not stockholders, but are parties to a standard express operations agreement effective March 1, 1954. That agreement



replaced the 25-year agreement which became effective on March 1, 1929.

[fol. 11] Commissioner Catterall: The nonholding railroads are parties to the standard agreement?

A. Yes, sir, a considerable number of them are.

Mr. Gay:

Q. As respects the owning railroads, which you say are parties to this general agreement, state in a brief way how the Express Company compensates the railroads for carrying their express matter.

Mr. Elliott: That is objected to.

Commissioner Catterall: I think we had better let them put in anything they want, for fear we might exclude something that a higher court might say we should not have excluded. Have you any particular reason for not keeping it in?

Mr. Elliott: We are dealing with the Railway Express Agency, and we are not going to go through the 321 railroads and the accounting procedures of those railroads and whether compensating to them. I think it should be confined to the taxpayer, as to what they give away of their money to the railroads. That is up to them, but the railroads are not before the Commission; but the taxpayer is before the Commission, and we will get into side issues that are not here involved, and I think it is time now to limit this proceeding to the Railway Express Agency, without going through the United States as to what railroads have agreements with them, or steamboat companies, or airplane companies.

Mr. Gay: The purpose of that question was to elicit a figure that is indisputable, that, owning the line, the standard contract is—

Commissioner Catterall: I thought the witness said the contract was with nonholding railroads, not owning stock.

Mr. Gay: No, all lines, and I was addressing my question as to those parties who are owners.

Commissioner Catterall: Do the sixty-eight owning railroads, which, for convenience, we will refer to as "the sixty-

eight," did they sign the same standard agreement as the other railroads signed?

A. Yes. There are 109 non-stockowning railroads who are parties to the standard agreement and 68 stockowning carriers.

[fol. 12] Q. And they all signed the same standard agreement, whether owners or nonowners?

A. Yes.

Mr. Gay: I don't want to go beyond the point, but to show that, with respect to the owning railroads, their part consists of the revenue of the Company over and above actual operating expenses, that the Express Company collects over and above their operating expenses, and I think Mr. Elliott is correct in his view that this is not a record in regard to the railroads, airline companies, or other lines. We are here as to whether the Railway Express Agency is liable for this franchise tax.

Mr. Elliott: I think it is utterly immaterial what the Railway Express Agency does with its money over and above its expenses; and if they don't want to retain any of it over and above their operating expenses, that is all right, but I don't think that is the inquiry here today. Taxes are liable before the railroad receives anything. I don't think that has any bearing.

Commissioner Catterall: The applicant has a right to make up the record, and I think we had better hear the evidence before we decide whether it is material or immaterial.

Mr. Gay: May I say one other thing to the Commission without belaboring the point. As I understand the purpose of this tax, as a franchise tax, as explained to the Finance Committee of the House of Delegates and the Senate by Judge Catterall at the time he and Mr. Morrisette were advocating its passage, was to assess the element of value of the Express Company's properties; which, for a better term, would be called "good will." In other words, it was something different from the "dry bones" property in the State. I think we have a right to show whether there is existent or nonexistent any such value, and this testimony bears on that subject, for what it might be worth. I think



its relevancy is apparent. Whether it is sufficiently probative in its effect to warrant the Commission's holding one way or the other is a point I am not arguing.

10:25 A. M. Commissioner Catterall: The Commission will recess for five minutes to discuss this matter.

10:30 A. M. The Commission resumes its session.

Commissioner Catterall: At this point the Commission rules that the evidence offered by the applicant is immaterial.

[fol. 13] Mr. Gay: We respectfully note an exception and reserve the point, and I would like to vouch the record a little later on as to, had the witness been permitted to answer the question, what he would have stated.

Commissioner Catterall: I think the ordinary procedure would be to put in the evidence that has been included within the ruling that, in our opinion, it is immaterial.

Mr. Gay: You will permit us to put it in, but you do not regard it as material?

Commissioner Catterall: We don't want to vouch the record, because the Commonwealth might want to cross examine on it, reserving any rights it might have.

Mr. Gay: Mrs. Wootton, will you read the question, please?

Note: Question read as follows:

"Q. As respects the owning railroads, which you say are parties to this general agreement, state in a brief way how the Express Company compensates the railroads for carrying their express matter."

Mr. Elliott: It appears from the witness's prior statement that there is in effect a contract. It seems to me that, if this evidence is to go in, it ought to go in in the form of a contract and not this witness's comment on what the contract provides.

Commissioner Catterall: Yes. I assume he has a contract. We don't want second-hand evidence of a written contract.

Mr. Gay: We have it right here.

Mr. Elliott: We don't need his interpretation of it.

Mr. Gay: We have the written contract, and I expect to introduce it into the record. It is a very voluminous docu-

ment which, for purposes of this case, is material only in a manner which can very briefly be summarized, and that is my purpose in the question asked.

Commissioner Catterall: Let the witness identify the contract.

Mr. Gay:

Q. I hand you a paper writing of March 15, 1954, and ask you to state what that document is.

A. This Standard Express Operations Agreement is a uniform agreement separately executed by 68 stockholding [fol. 14] railroads and 109 nonstockholding railroads covering the handling of express traffic by the Railway Express Agency, Incorporated.

Commissioner Catterall: Is that the agreement in effect today?

A. Yes, sir.

Mr. Gay: We offer that in evidence.

Commissioner Catterall: That will be marked "Exhibit 1, Rejected." I think any comment on what the contract means should be put in the brief, rather than in the testimony of the witness.

Mr. Gay: I don't propose to ask the witness what the contract means, because the language is the best evidence of that, but the witness is competent to say, and I think it would be informative to the Commission if he did say, how it operates.

Mr. Elliott: I don't agree with that. I think it is assumed that it operates in conformity with the agreement.

Commissioner Catterall: Don't the railroads operate under the agreement as written?

A. Yes, sir.

Mr. Gay: I wish to prove by the witness that under this document, and I started out by beginning first with the parties who are owners, that they receive their compensation for their services in transporting express matter in railway cars a certain amount of money which, in respect to their business, is what remains after the actual out-of-pocket

expenses of the Railway Express Agency in payrolls and other daily costs are paid; so that there is, in respect to the Express Company, no net revenue from the business which it conducts and which the railroads transport. The Express Company pays the difference between what the daily out-of-pocket expense is and what it receives from the public for the express matter transported, and substantially the same result comes about from the operation of the Express Company's business on nonowning lines. That is the purpose of my question.

Mr. Elliott: I don't see where that has anything to do with this case. We are talking about the Railway Express Agency, and not the owners of it or anybody else, and I think that is as far as it should go.

[fol. 15]. Commissioner Catterall: I don't see any reason for asking the witness any questions about the contract. You are not offering any parol evidence to verify it?

Mr. Gay: No, we are not offering any parol evidence, but I think it is proper to explain to the Commission, as to any other court, how a contract operates, and I don't believe you can get it primarily from the four corners of the instrument, however, in saying it is spelled out in that contract.

Commissioner Catterall: We don't think oral evidence is proper for that purpose.

Mr. Gay: I understood Your Honors to rule it is not relevant.

Commissioner Catterall: No, I said it is not material. This is offered under the best evidence rule.

Mr. Gay: I don't see how, if it is excluded, what the object is to putting it in, unless the Commission felt it was—

Commissioner Catterall: There is a difference between excluding it on the question of immateriality. This is a different rule of evidence, as to a written document which the witness agrees is according to its terms and not to be explained by the witness, but it can be explained by counsel in the brief.

Mr. Gay: I am not going to labor the point, but I would like to state for the record that that is what would be stated if he had been allowed to answer.

Chairman King: What you have just said?

Mr. Gay: What I have just said. Counsel for the Com-

mission and the Assistant Attorney General appearing in this matter have stipulated with us in a manner which I will file as part of the record as Exhibit No. 2.

Commissioner Catterall: That will be filed as Exhibit No. 2.

Mr. Gay: This stipulation reads as follows:

"It is hereby stipulated by the undersigned as follows:

"First: Railway Express Agency, Incorporated, was organized under the laws of the State of Delaware in December 1928. It conducts an express business in interstate commerce and intrastate commerce in each of the states of the United States with the exception of Virginia, in which it conducts only an interstate business.

"Second: Railway Express Agency, Incorporated, of Virginia [fol. 16] was organized under the laws of the State of Virginia on the 30th day of October, 1931. It conducts solely an intrastate business in the State of Virginia."

I would like to note for the purpose of the record, as we expect to rely upon it in briefs, the opinion of the Commission as reported in its 1929 Reports at Page 252 denying to Railway Express Agency, Incorporated the right to do an intrastate business in this State. That opinion of the Commission was affirmed by the Court of Appeals in Virginia in 1929, 153 Virginia 498, and it was, in turn, affirmed by the Supreme Court of the United (sic) in 1931 in 282 U.S. 440.

I don't know that we care to introduce them in the record, but I should like to have it understood that, if it is desired by either party to refer to them, that copies of the charter of the Delaware company and the Virginia company are on file in the Corporation Commission, and either party may refer to them.

Mr. Elliott: I have no objection to that.

Commissioner Catterall: That will be all right.

Mr. Gay:

Q. It appears, Mr. Jump, from the Stipulation I have just filed, that the Delaware company has done an interstate business in Virginia since 1929 or 1930, and the Virginia company has done an intrastate business in Virginia since

it was organized in 1931. Have both of those companies reported to the Commission on forms prepared and promulgated by it its respective gross receipts derived from intra-state and interstate commerce, respectively, and the property, real, tangible, and intangible, in the State?

A. Both companies have so reported.

Q. Have you prepared at my request a statement showing the amounts reflected in the returns of the Delaware company for the years 1931 to 1956, inclusive?

A. Yes, I have.

Q. Do you have such a statement available? If so, I would be obliged if you would file it.

Mr. Elliott: May I ask what the purpose of this, is, please?

Mr. Gay: The purpose of it is to show that this company has, since its beginning to do an interstate business in Virginia, been assessed with gross receipts and certain property taxes, and the gross receipts taxes have been continually paid under protest and on the basis of formulas determined by the Commission and not with respect to any amounts which the corporation felt had any realistic relation to its gross receipts in Virginia.

Mr. Elliott: I see no need whatsoever to go into that with respect to formulas at prior times. The Commission will recall that the Supreme Court of Virginia said, in its opinion in the former case, that the evidence showed that the Company had agreed to the formula used, and that was that. The Supreme Court of the United States said that there was no evidence to upset the formula. We are not dealing with the prior taxes, or prior formulas, or anything else, but we are dealing with the 1956 franchise taxes, and I see no reason why this record should be encumbered by matters already adjudicated and concerning prior years.

Mr. Gay: There was one other point I intended to mention as the basis for the introduction of this statement. I had not quite finished my statement.

For the first time in the history of this Company's operations in Virginia, its automotive equipment and trucks have been treated by nonassessment as rolling stock, and we expect to show by this statement that historically since 1931, this Commission has classified and assessed the automobile equipment and motor trucks of the petitioner as



tangible personal property and certified those figures to the local authorities for tangible personal property assessment. For the first time, the 1956 assessment imposes no assessment on the automotive equipment and trucks of the applicant, presumably on the theory that they are rolling stock, which is, in the applicant's view, incorrect, factually and legally and realistically.

I will amplify the exhibit now, showing the breakdown of Column F as against tangible personal property owned by the applicant. It seems to us the purpose of the Commission, although I do not undertake to exercise any psychic powers, by saying what it had in mind, but it seems that no assessment has been made this year on what the Commission for twenty-five years has considered tangible.

Commissioner Catterall: For twenty-five years the statute made no distinction between tangible personal property, and in 1956 the law was changed to exclude rolling stock, so that is why that change is made.

Mr. Gay: It has assessed the rolling stock in Virginia, [fol. 18] when it had any by tangible citus, (sic) and we expect to show that.

The second point I am trying to develop is that it seems the apparent purpose of broadening the tax base in lieu of which this franchise tax is imposed to intangible property and rolling stock. The Commission has for the first time in twenty-five years treated automobile equipment and motor equipment as rolling stock, although it had never been treated that way previously when the rolling stock had citus (sic) in Virginia. That is the dual purpose of this statement.

Commissioner Catterall: You are offering it as evidence of the administrative interpretation of the law as it was before 1956?

Mr. Gay: I will say "yes" to that, and as administrative interpretation of the law in 1956.

Commissioner Catterall: In 1956 the law said we were not to tax rolling stock.

Mr. Gay: But it did not define what rolling stock was, and there is nothing to justify the change in classification of property which for a quarter of a century has been regarded as tangible personal property into rolling stock.

Commissioner Catterall: Your contention is that a truck is not rolling stock?

Mr. Gay: The Commission has never so regarded it for twenty-five years. We did not have much, although we did have some, and when it was enough the Commission has assessed it as tangible property, but now it is assessed as rolling stock; the Commission has used rolling stock.

Commissioner Catterall: When you say "rolling stock," you mean that on rails?

Mr. Gay: Yes.

Commissioner Catterall: Which could not have a local citus? (sic)

Mr. Gay: Yes.

Commissioner Catterall: And the Legislature has said that anything on wheels is exempt.

Mr. Gay: I don't want to be presumptuous (sic) in saying this, but, putting it very plainly, this "in lieu" is not—

Commissioner Catterall: That is in lieu of all taxes, which the General Assembly of Virginia could make it in lieu of.

Mr. Gay: I would like for the Commission to hear the point I am about to make, because it is the crux of our contention.

The Legislature did not say that this franchise tax shall be in lieu of all other taxes. It could not be anything but [fol. 19] rolling stock and intangible personal property, because tangible property is by the Legislature segregated, and that could not be a franchise tax in lieu of property tax, which the Legislature did not have a right to impose; so they did what the Constitution said they could do, they made it in lieu of the two kinds of property which the State had a right to control, that is, intangible property and rolling stock, and I expect to show that the only intangible property the Company has ever owned in bank balances, and that runs \$100,000 and the taxes about \$200.

Mr. Elliott: This is all argument.

Mr. Gay: No.

Commissioner Catterall: The whole thing is argument. Let me ask the witness one question.

Q. Did the Railway Express Agency send a check for this rolling stock, for this stock Mr. Gay says is not rolling stock?



A. As I understand, the tax has been paid under protest.

Q. Did not the Company send in the money for the tax on the rolling stock?

A. We paid a tax for a number of years on rolling stock in small amounts.

Q. Did not the State send that back, or something?

A. No, we paid the tax each year for a number of years on refrigeration car mileage.

Q. Did you not pay it in 1956 and get the money back?

A. No.

Mr. Gay: There was no assessment made against the Company, and had not been since 1950, on rolling stock, on the assumption of Mr. Maston's view that there was not sufficient rolling stock in Virginia to give it a physical situs (sic) in Virginia to warrant the tax, and that this franchise tax is in lieu thereof.

Commissioner Catterall: When you say "rolling stock," you mean rolling stock on rails, and we interpret the rolling stock to mean all rolling stock, which means motor vehicles as well?

Mr. Gay: You have done that this year. For twenty-five years you have not been interpreting it that way, but have interpreted it to mean cars on rail wheels; and the motor equipment, the trucks that run around the streets and the little trucks on the platforms, those have been in the past all treated as tangible personal property and all so reported [fol. 20] and assessed by the local authorities; and this year the Commission made no assessment on the theory that that was rolling stock, and we are trying to develop the fact that on the Commission's own interpretation as to what "tangible personal property" means, it is not only the furniture and fixtures, but the motor stock trucks, and so forth.

Mr. Elliott: I assume Mr. Gay is trying to put his own interpretation on what "rolling stock" means. The situation was that, prior to this legislation, the rolling stock was assessed as tangible personal property. It was not assessed as such this year. In the case of railroads, we have assessed all of their rolling stock, including trucks and everything else, as rolling stock. The Legislature made a complete change this year, and the Commission assessed

that, and the tax here involved is in lieu of one thing, tax on rolling stock, besides other things, so it seems to me that it is an entirely new thing for the Commission and not a matter of what has happened under an entirely different statute at a prior time.

Chairman King: Did the statute change the definition of what "rolling stock" is?

Mr. Elliott: Here is what the statute says:

"Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

Rolling stock was not mentioned in the prior statute. In other words, "rolling stock" was not segregated by the other statute.

Mr. Gay: May I read the next section, which shows the Legislature intended that the Commission should continue to do what it had been doing in taxing the tangible personal property. This is Section 58-548:

"Annual report.—Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding."

[fol. 21] Now, it seems to us perfectly apparent that the Legislature did not by that regulation attempt to reclassify for purposes of taxation the tangible personal property of these corporations which the Commission had for a quarter of a century classified the automobile trucks (sic) as tangible personal property in citus (sic) to the locality for assessment, otherwise it would have said so; but it said it should assess the tangible personal property, leaving the rolling stock to be assessed for State purposes along with intangible property, and in a number of our cases there is just no property here in lieu of which this franchise tax should be imposed.

Commissioner Catterall: The Company has no rolling stock to speak of except the automotive equipment.

Mr. Gay: Then the law is unconstitutional, since it cannot impose a franchise tax and make it in lieu of property taxes unless the tax on the property would be substantially the same as that in lieu of which the franchise tax is imposed. ©

Mr. Gray: It seems to me to be a rather strange way to go about interpretation of the tax, and I suppose the way to make it clear would be to make them——

Commissioner Catterall: It is purely a question of what the new law means, and the Commission in interpreting the law did not impose any taxes including its automotive equipment, so what happened before 1956 would throw no light on the 1956 statute, which was passed obviously to make the law more constitutional and not less constitutional. It makes it more constitutional if you include the automotive equipment; but you are arguing, Mr. Gay, that the Legislature wanted to make it less constitutional.

Mr. Gay: No, I think the Legislature meant to do what it was saying, that is, invoke the Constitution. Under the Constitution it may impose a franchise tax and make it in lieu of taxes on other property. Now, the only other property which this Corporation has in the State is some intangible property like money. It also has its automotive equipment and trucks in the cities and, intermittently, it has cars passing through the State, and the franchise tax has to be in lieu of all three of those. We expect to show from the statement and testimony of the witness that, even if you include the taxable values of automotive equipment or trucks, that the tax is not constitutional. But, excluding those values as the Commission has done and imposing no tax on rolling stock, you have imposed a tax of 2-3/20 in lieu of them. This is unconstitutional for the reasons I have stated.

[fol. 22] Commissioner Catterall: We will exclude the exhibit insofar as it relates to taxes prior to 1956 and, of course, you can offer any evidence on the 1956 tax.

Mr. Gay: Do I understand Your Honors are denying us the right to show the automotive equipment and trucks as tangible personal property and so classified and used?

Mr. Gray: I understood the witness testified that prior to 1956 they had so classified it. This evidence is not in conformity with that.

Mr. Gray: That was a general statement.

Mr. Gray: The evidence is that not all rolling stock or tangible personal property was so treated.

Mr. Gray: The tax on tangible personal property is segregated for local taxation, and the State would have no right to impose a franchise tax in lieu of that tax on tangible personal property.

Commissioner Catterall: The Constitution does not segregate rolling stock for public service companies and other companies.

Mr. Gray: That was held in the Eustis Freight Company case. Are we going to be denied the opportunity of presenting that?

Commissioner Catterall: The exhibit will be marked "Exhibit 3, Rejected."

Mr. Gray:

Q. This Exhibit 4, Rejected, seems to be self explanatory, Mr. Jump, and I will not ask you in detail about it, other than to inquire if it does not show the values reported by the Company, those assessed by the Commission and the taxes paid by the Company on the assessments.

A. It shows all of those things.

Q. It also shows, directing your attention for the moment to the extent to which the Commission admitted evidence as to the prior exhibit, it also shows the values reported for 1956 and those upon which the Commission made an assessment and those which it did not; is that correct?

A. That is correct.

Q. I notice that none of the taxes are shown as having been paid for 1956. Is that attributable to the fact that at the time the statement was made the local taxes had not been paid?

A. That is correct.

Mr. Gray: I take it, to digress just a moment and come back to Your Honors' general ruling on the subject, that we [fol. 23] would not be permitted to introduce the Company's protest attached to the prior assessments.



Commissioner Catterall: Only the protest that came with the 1956 record.

Mr. Gay: I just wanted to be sure.

Commissioner Catterall: That formal protest of 1956 is in the Petition?

Mr. Gay: Yes.

Mr. Elliott: We admit that in the record, without further explanation.

Commissioner Catterall: The record now shows that the tax of 1956 was paid under protest in the form shown in the Petition.

Mr. Gay:

Q. On Exhibit 4, Rejected, which you just filed, Mr. Jump, there appears a column "Automotive Equipment," and the total amount of that kind of tangible personal property reported in 1956 was \$239,465.24?

A. That is correct.

Q. Have you also prepared at my request a statement showing the number of units of that type of equipment and the cities and states in which they are respectively located?

A. Yes, sir.

Mr. Gay: We would like to offer that as the next exhibit.

Commissioner Catterall: That will be Exhibit 5—

Mr. Elliott: I object to that. I think it is immaterial where it is located.

Commissioner Catterall: That is obviously immaterial.

Mr. Gay: It will be marked "Exhibit 5, Rejected," will it not?

Commissioner Catterall: Yes, Exhibit 5, Rejected.

Mr. Gay:

Q. Have you at my request prepared a statement similar to Exhibit 3 of the real estate or other property owned by the Virginia Company in the State of Virginia for the years 1933 to 1956, inclusive?

A. Yes, sir.

Mr. Gay: We offer that as the next exhibit.

Mr. Elliott: I object to that.

Commissioner Catterall: Exhibit 6, Rejected, is filed. This is the Virginia Company?

[fol. 24] Mr. Gay: Yes.

Mr. Gray: I wonder if we could inquire on what theory they want to encumber the record of this case with the Virginia Company.

Commissioner Catterall: Let me ask the witness a question about that.

Q. Mr. Jump, the Delaware Company owns all of the stock of the Virginia Company, does it not?

A. That is correct.

Q. And both companies in Virginia use in their business the same property?

A. That is correct.

Q. The same vehicles, the same real estate, the same furniture, and same everything?

A. That is correct.

Q. So whether the title of this property we are speaking of is in the Virginia Company or the Delaware Company depends on the decision of the Delaware Corporation, it could be either one or the other Company, or intermingled?

A. I don't know whether that is a question I could answer or not. There may be some legal connotation which I don't know about, but, so far as operational operations are concerned, it would be my thought that the Express Company, operating under the reasonable way they operate—we were forced by law to set up the Virginia Company to do the intrastate business, and in my opinion the intrastate business in the State of Virginia would not support a company that was operating with personnel and equipment and facilities entirely separate and by itself. If the Virginia Company were owned by the citizens of the State of Virginia, I think they would probably want to make an arrangement with the Railway Express Agency, which carries on the interstate business, for the use of joint employees, joint equipment, joint forms, and so forth. Our receipt forms carry the name of the Delaware Company. Opposite the name of the Delaware Company, it says, "For interstate shipments," and also now under that is the name of the Virginia Company, and opposite the name of the Virginia Company it says, "For intrastate shipments." The two companies have undertaken to operate in an efficient, eco-

nomical operation, but, in fact, the business is carried on by separate companies.

Q. Do you know who decides to register an automobile in the name of the Delaware Company in Virginia or the name of the Virginia Company?

[fol. 25] A. I believe all the automobiles are registered in the name of the Delaware Company. The Virginia Company pays for its proportion of use of the vehicles.

Q. And you don't know who made the decision to put it in the name of the Delaware Company or the Virginia Company?

A. I would say the management of the Delaware Company, which owns the Virginia Company, would make the decision. The Delaware Company owns all of the stock of the Virginia Company, and, for the benefit of the public that is served, we undertake to operate economically, and the equipment, the employees, and the agencies, and all of its facilities, are used jointly by the two companies, which I think would be the case if somebody else owned the Virginia Company, they would want to make an arrangement with the two companies, because the same customers operate interstate and intrastate.

11:25 A. M. Commissioner Catterall: The Commission will recess for ten minutes.

11:35 A. M. The Commission resumes its hearing.

Mr. Gay:

Q. Mr. Jump, I notice on Exhibit 4, Rejected that under the column "Other tangible personal property," that nothing was reported by the Company, and consequently no assessment was made by the Commission or taxes paid on that classification from the years 1947 to 1956. Will you explain for the record why that is true?

A. The values of the property reported in the column "Other tangible personal property," prior to 1947 was included in the other column after 1946. It represents the so-called "Minor items," which are presently classified as "Minor items," having an average cost of \$50 or less. Those items were frozen in our accounts, picked out of the individual accounts for various classes of property, and trans-



ferred to a new account under the order of the Interstate Commerce Commission along about 1935. The total of that account changed very little from that time on, and the discontinuance of that separate column and inclusion of items of various classes of property in the other columns was by agreement with the representative of the State Corporation Commission in 1946. In other words, commencing with 1947 we disregarded the value of the items set up in the separate account "Minor Equipment" and actually reported [fol. 26] the units of property on hand in the various places in Virginia.

Q. Under whose instructions did you say that was done, with the State Corporation Commission of Virginia?

A. It was in accordance with an understanding with Mr. Masten, First Assistant Assessor, in a conference between him and our General Auditor, Mr. Kennedy, and our Auditor of Disbursements, Mr. Warner, and our Tax Accountant, Mr. Englehard, of Chattanooga.

Q. That is sufficient for the record. I do not observe, Mr. Jump, from Exhibit 4, Rejected, any enumeration of values of rolling stock. Have you, at my request, made an investigation of that subject, and are you prepared to state during what years, say, from 1931, the Commission has required of the Company a report of the rolling stock values and during what years any assessments were made upon it?

Mr. Elliott: As I understand, we are still vouching the record?

Commissioner Catterall: We are still just making up the record.

A. Rolling stock was not ever reported in the annual report of the Express Company to the State Corporation Commission of Virginia, but we did report, the Delaware Company reported, certain data with respect to rolling stock in the report required of carline companies.

Mr. Gay:

Q. That is on a form promulgated by the Commission?

A. Yes, sir.

Q. And what were the amounts reported, and what were

the taxes imposed, according to the Company's records, during the years I mentioned?

A. I have two reports that were available in our files in New York from 1943. A tax of \$2.40 was paid on the date of December 31, 1943; and a tax of 88 cents was paid on the basis of the year ending December 31, 1944; tax of \$1.60 was paid on the basis of the report for the year ending December 31, 1945; tax of \$1.05 for the year ending December 31, 1946. There was no tax assessed in connection with the report for the year ending December 31, 1947; and the tax assessed on the basis of the report for year ending December [fol. 27] ber 31, 1948 amounted to \$75.10. A tax of \$489.89 was assessed in connection with the report for the year ending December 31, 1949. This is the report of carline companies rendered by the Railway Express Company, Incorporated.

Q. What was the nature of the rolling stock described in those reports and in respect to which those taxes were assessed?

A. They were express refrigerator cars, that is, railroad cars. There were a few horse-auto cars, but I think we never had more than half a dozen of those cars in those years, though; it was primarily refrigerator cars.

Q. Those cars were expressly owned by the Express Company?

A. Yes.

Q. It has nothing to do with the cars which the railways own and in which they transport express matters.

A. That is correct. We report mileage only for cars owned by the Railway Express Agency.

Q. What has happened since 1950? Have any taxes been assessed against the Company's refrigerator cars?

A. No, the last tax assessed was the figure in connection with the report for the year ending December 31, 1949.

Mr. Elliott: As we are passing to another subject, and as long as we are vouching the record, it appears that by a ruling of the Commission at the request of the Express Company made in 1951, its rolling stock would not be assessed as a carline company.

Mr. Gay:

Q. Mr. Jump, I hand you a photostatic copy of the Railway Express Agency's voucher of September 19, 1956, which is in the amount of \$139,739.66, as well as a photostatic copy of the official receipt from the Treasurer of Virginia, apparently stamped as of September 26, 1956, acknowledging payment of the tax in the amount I have mentioned; and I would like to file those.

Commissioner Catterall: They will be clamped together and received as Exhibit 7.

Mr. Gay:

Q. I also hand you a photostatic copy of a receipt from the Treasurer of Virginia showing payment of the 1956 [fol. 28] franchise taxes by Railway Express Agency, Incorporated, of Virginia, amounting to \$13,173.38, and ask you to identify that.

A. Yes.

Commissioner Catterall: That will be received as Exhibit

8.

Mr. Gay: There seems to be some confusion in the mind of my assistant as to whether in rejecting that Exhibit No. 3, which contained the figures for 1956, the rejection went to the year 1956.

Commissioner Catterall: No, sir, nothing on Exhibit 3 nor Exhibit 4 relating to the year 1956 is rejected.

Mr. Gay: That is all, if Your Honors please; that is the Applicant's case.

Mr. Elliott: May we have a few moments?

11:50 A. M. Commissioner Catterall: Yes, the Commission will recess for five minutes.

12:10 P. M. The Commission resumes its session.

Cross Examination.

By Mr. Elliott:

Q. Mr. Jump, as I understand it from your testimony, the Delaware Company has an exclusive express privilege throughout the United States, is that correct, except for intrastate commerce in the State of Virginia?

A. "Exclusive \* \* \*" How did you put that?

Q. "Exclusive express privilege."

A. Will you read the question, please?

Note: Question read as follows:

"Q. Mr. Jump, as I understand it from your testimony, the Delaware Company has an exclusive express privilege throughout the United State, (sic) is that correct, except for intrastate commerce in the State of Virginia?"

A. You mean on railroads?

Q. Yes, as one mode of transportation.

A. The Railway Express Agency has, under the Standard Express Operations Agreement, it has the exclusive right for the conduct and transaction of express transportation business on all carriers, which are parties to that agreement.

[fol. 29] Q. It also has express privileges of truck lines, air lines, and steamboat lines; is that correct, sir?

A. It has contracts with a number of air lines, a number of truck lines, and some steamboat lines.

Q. Are there other express companies operating in the United States, other than the Virginia Company?

A. There are a lot of people in the express business. There may not be anybody operating on the railroad as an express company other than the Railway Express Agency intrastate and interstate in every state except Virginia. Our Railway Express Agency of Virginia is intrastate in Virginia.

Q. You stated that the Delaware Company owns the entire capital stock of the Virginia Company?

A. That is correct.

Q. Does the Virginia Company owe any other indebtedness other than current bills? Does it have any fixed indebtedness?

A. No.

Q. Does the Virginia Company have a contract with the railroads, or does it operate exclusively through the contract of the Delaware Company?

A. I think the contract between the Virginia Company and the Delaware Company speaks for itself. It provides, in substance—

Q. Is there a written contract between the Delaware Company and the Virginia Company?

A. Yes, sir.

Q. And is there one between the Virginia Company and the railroads?

A. No, the contract between the Delaware Company and the Virginia Company was entered into in March 1932, and a copy of that contract appears in our annual report each year to the Virginia State Corporation Commission.

Q. That is the report I show you here, for the year 1955?

A. That is Page 34 of that annual report of the Virginia Company.

Q. By the way, Mr. Jump, do you have available another copy of this annual report to the Commission?

A. I have my file copy.

Q. You have no other copy?

A. No.

Commissioner Catterall: Can you get along with a copy of the contract?

[fol. 30] Mr. Elliott: I am not interested so much in the contract as the figures that appear in this report, and we will have to arrange to get a copy of the report to be filed as an exhibit in this case.

Commissioner Catterall: If that is filed as an exhibit in this case, it will be always available?

Mr. Elliott: Yes.

Commissioner Catterall: I see no objection to filing the original.

Mr. Gay: Just treat the original as on file in this case?

Mr. Elliott: Yes, we will keep it in the office downstairs, but it will be available at all times for all parties.

Mr. Gay: I think it should be given an exhibit number.

Commissioner Catterall: It will be filed as Exhibit 9 in this case.

Mr. Gay: That carries with it the privilege for either party to take any excerpts or data from it?

Commissioner Catterall: Yes, either side, but the exhibit will not go in the record, but a space will be reserved for it.

Mr. Elliott: May we do the same with the tax return of 1955?



Commissioner Catterall: That will be Exhibit 10, with the same privileges. Don't you have extra copies of that?

Mr. Elliott: We have no more copies. May the Delaware Company's report be marked as Exhibit 10, and the Virginia Company's as Exhibit 11?

Commissioner Catterall: Yes, Exhibit 10 for the Delaware Company, and Exhibit 11 for the Virginia Company.

Mr. Gay: As I understand, counsel introduced as Exhibit 9 the 1955 operating report of the Virginia Company?

Mr. Elliott: I would like to introduce them both. I would like to have the separate report for both companies, if I may, for 1955.

Mr. Gay: The Delaware Company and the Virginia Company?

Mr. Elliott: Yes, I marked the Virginia Company "Exhibit 9," and I would like to have the Delaware Company marked "Exhibit 9-A."

Commissioner Catterall: The 1955 annual report of the Delaware Corporation will be received in evidence as Exhibit 9-A, with the understanding that it will remain in the [fol. 31] tax reports of the Commission and either party may copy from it whatever it wishes.

Mr. Gay: So that there may be no confusion, when we speak of "the 1955 report," we mean the report filed in 1956 of the 1955 operations, do we not?

Commissioner Catterall: That is exactly right.

Mr. Gay: The other two exhibits, Nos. 10 and 11, respectively, were the property reports for tax purposes of the two companies.

Mr. Elliott: Plus the gross receipts returns. The complete tax returns.

Mr. Gay: The Delaware Company showed no gross receipts.

Commissioner Catterall: Are you through, Mr. Gay?

Mr. Gay: Yes.

Commissioner Catterall: You may stand aside, Mr. Jump.

Witness stood aside.

Commissioner Catterall: Have you any other witnesses, Mr. Gay?

Mr. Gay: No, that is our case.

Commissioner Catterall: In your petition you have a paragraph stating that the amount of the tax, in the amount of \$139,000, was not correctly computed. Do you now waive that point?

Mr. Gay: No, sir, we don't waive it, because, in our opinion, from a legal standpoint, there is no way that a tax could be computed to yield a franchise tax to the State of Virginia based on gross receipts which would not be unconstitutional.

Commissioner Catterall: Are you disputing the amount of the assessment, in addition to the constitutionality of the assessment?

Mr. Gay: I am doing both. I am disputing the amount, in the sense I have just stated, that there is no practical way, having regard to the nature of the operations of this Company and kinds of property it has in Virginia, that a constitutional tax in lieu of the other tax could be lawfully assessed.

Commissioner Catterall: In view of that, I think the record should show how the tax was computed.

Mr. Elliott: All right. Mr. Dickerson, will you please take the stand.

[fol. 32] CHARLES W. DICKERSON, a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. Elliott:

Q. Would you state your name, please?

A. Charles W. Dickerson.

Q. What position, if any, do you hold with the Commission?

A. Public Utilities Appraiser in the Tax Division of the State Corporation Commission.

Q. And for how long have you been engaged in that work?

A. Since 1935.

Q. You work under Mr. Masten, do you not?

A. I do.

Q. He is Director of Public Service Taxation?

A. Yes, sir.

Q. Is it a part of your duties to receive and inspect the returns made by the Railway Express Agency, the Delaware Corporation, and the Virginia Company?

A. Yes.

Q. And prior to receiving the report for the assessment of taxes for the year 1956, did you send a questionnaire to be filled in to those companies?

A. Yes.

Q. I hand you what purports to be a form of annual report for express companies to the State Corporation Commission for the year 1956 and ask you if that was the form which was sent to the Delaware Company.

A. It is.

Q. Was that also sent to the Virginia Company too?

A. Yes, it was.

Q. What is the purpose of that report, Mr. Dickerson?

A. To get from the two companies information from which we make our assessment.

Mr. Elliott: May I ask that that be received in evidence as Exhibit 12.

Commissioner Catterall: It will be received as Exhibit 12.

Mr. Elliott:

Q. Pursuant to that request for information for the purpose of assessing this tax, did the Delaware Company and the Virginia Company file returns?

[fol. 33] A. Yes, they filed returns, but not on this form. They filed returns on the old forms we used prior to 1956.

Mr. Gay: I am sure you do not want to put into the record something that is incorrect, but both Judge Catterall and Mr. Masten will remember that on the morning that Mr. Waldrop and I appeared in Judge Catterall's office for the purpose of the conference concerning the contemplated amount of the franchise tax, I handed to Mr. Masten the official report made by the Delaware Company, which is the one on file in the Commission, which is the only form we had received up to that time for reporting in the year 1955. At that interview Mr. Masten handed us for the first time

Exhibit 12. That was handed us then for the first time. I am sure this witness was not appraised (sic) of this, but I am sure Mr. Masten will advise that that is the sequence of events.

Commissioner Catterall: That is correct.

Mr. Elliott: We don't dispute that.

Mr. Gay: It is hardly fair to ask the witness if the Company reported on something different from what he received.

Mr. Elliott: He stated that the Company made the report on the old form. We take no exception to that; the circumstances are agreed to on that.

Commissioner Hooker: Was that filed before you received the new form?

Mr. Gay: Yes.

Commissioner Hooker: I thought that was the point you were making.

Mr. Gay: Yes, the point I was making is that we did not make that return in response to this. We had never seen this return up to the time it was filed.

Mr. Elliott:

Q. Did you make the assessment, or was it made under your direction and supervision or the direction and supervision of Mr. Masten, of the franchise tax of the Railway Express Agency, the Delaware Company, for the year 1956?

A. I did.

Q. And will you explain how that assessment was made by the Commission? We are speaking of the franchise tax.

Mr. Gay: It would be perfectly agreeable to us to permit the witness to file the statement before him.

[fol. 34] Mr. Elliott: It is already in evidence. It is Exhibit 10.

Mr. Gay: That was not in that report when filed by us.

Commissioner Catterall: It is in the assessment?

Mr. Gay: Not in the report, but in the assessment.

A. This is a somewhat complicated formula that was developed. In order to arrive at a figure, we worked from the amounts that were paid by the Express Company to the

various railroads that operate in Virginia. We found that the ratio of gross receipts of the Express Company to the amount paid to the railroads was approximately 2.824, and we then took the payments that were made to the Virginia railroads and raised them by that ratio to arrive at a gross revenue figure that the Express Company received from business done on the Virginia roads.

Mr. Elliott:

Q. Let me ask you right there, did you consider all railroads, or just the large railroads?

A. We included only the six largest carriers.

Q. Who are those carriers?

A. The Atlantic Coast Line; The Chesapeake & Ohio; the Norfolk & Western; Richmond, Fredericksburg & Potomac; Seaboard Air Line, and the Southern Railway.

Q. You did not, as I understand it, consider any revenue from the Atlantic & Danville Railroad Company, the Carolina & Northwestern Railway Company, the Chesapeake Western Railway Company, the Clinchfield Railroad Company, the Louisville & Nashville Railroad Company, the Norfolk Southern Railway Company, Pennsylvania Railroad Company, Virginian Railway Company, Winchester & Strasburg Railroad Company, and the Winchester & Potomac Railway Company; is that correct?

A. That is correct.

Q. Explain why those smaller railroads were not used in this calculation.

A. The amount of express business done over those railroads that you listed was so small as compared to the total that we eliminated those railroads from our calculations in order to simplify the computation.

Q. Was that favorable to the Express Company?

A. Yes, it should be.

Q. All right, sir. Now, what did you determine to be the total amount of payments to the six railroads which were used in connection with the ascertainment of this franchise tax?

[fol. 35] A. \$11,467,119.00.

Q. And what did you determine to be the Virginia revenue of those railroads?



Mr. Gay: You mean express revenue?

Mr. Elliott: Yes.

A. You mean the express revenue the Express Company collected on those railroads, or the amount of payments?

Mr. Elliott:

Q. The six railroads had total payments from the Express Company of \$11,467,119.00?

A. That is correct.

Q. Then, you determined what was the percentage of mileage of each of those six railroads in Virginia; is that not correct?

A. That is correct.

Q. And you multiplied that percentage by figures making up the \$11,467,119.00 total; is that correct?

A. That is correct.

Q. And that gave you a total figure of how much?

A. \$2,164,303.00.

Q. And that represents only the payments to the railroads from the Express Company?

A. That is correct.

Q. And in order to get that figure as to what the express receipts of the railroads in Virginia were, you had to multiply by your figure of 2.28 per cent?

A. That is correct.

Q. That gave you a figure of how much?

A. \$6,111,992.00.

Q. Now, were there any other revenues considered in calculating the franchise tax, Mr. Dickerson?

A. Yes, the revenue from the air express.

Q. And what air carriers were considered in calculating that?

A. The American Airlines, Capitol Airlines, Eastern Airlines, National Airlines, and Piedmont Airlines.

Q. What was the gross express revenue of the five carriers you have just mentioned which was considered in connection with the ascertainment of this tax?

A. \$16,313,707.00.

Q. The payments making up that total figure of \$16, [fol. 36] 000,000 that you have just spoken of, for that did

you apply a mileage percentage on each of these carriers in Virginia?

A. Yes.

Q. That represented the mileage they traveled in Virginia; is that correct?

A. That is correct.

Q. Or the proportion of mileage?

A. The percentage of that mileage in Virginia.

Q. And that gave you a total figure of how much?

A. \$1,000,243.00.

Q. In ascertaining the total tax of \$139,739.66, I wish you could explain how that figure was ascertained.

A. We added the total figure for the railroads of \$6,111,992 to the total gross paid the airlines of \$1,000,243, to get the total of \$7,112,235.

Q. What did you subtract from that?

A. From that figure we subtracted the amount reported by the Virginia Corporation of \$612,716.00.

Q. That was its intrastate receipts in Virginia; is that correct?

A. That is correct.

Q. That gave a total interstate figure of how much?

A. \$6,499,419.00.

Q. And to that you applied the tax rates set up in this statute?

A. That is correct.

Q. And that gave you a total of what?

A. \$139,739.66.

Q. I believe those figures you have been testifying about are shown in Exhibit No. 10; is that correct?

A. That is correct.

Q. The figures for the Virginia Company are shown in Exhibit 11?

A. That is correct.

### Cross Examination.

By Mr. Gay:

Q. Mr. Dickerson, the tax report filed by the Delaware Company, which you have before you for the year 1956 re-

flecting 1955 operations, has on the first page other than the cover page, under the caption, (sic) "Receipts," "All receipts from business beginning and ending in this State," [fol.37] and there is nothing shown in the column opposite that, because the Delaware Company does no business in Virginia?

A. That is correct.

Q. And the next line says, "All receipts earned in Virginia on business passing through, into, or out of this State," and the report says "None."

A. That is correct.

Q. And there is attached to that a rider which states, "This company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into, or out of this State.'" That statement appears on the protest made a part of the return, does it not?

A. Yes.

Q. In the light of that statement, as I understand your testimony, the Commission undertook to develop a formula whereby it thought an amount could be ascertained which would attribute to Virginia such part of the Company's business as passed through or into or out of this State; is that correct?

A. Yes, sir.

Q. And the document you have been testifying to reflects the Commission's view of the formula that should be employed to produce an answer to that inquiry; is that correct?

A. That is correct.

Q. There are just one or two questions I want to ask you about this statement itself. Page 1, the first classification of revenue there, dealing with gross receipts from airlines: Do those figures, aggregating \$16,313,707.00, purport to reflect the gross express revenue of those five airline companies earned by the Delaware Company on those lines, or does it purport to reflect the amount the Express Company paid those lines for the privilege of carrying the express matter on those lines?

A. That reflects the total receipts for the business of the Express Company done over those lines.

Q. Presumably, what the Express Company received from the public for carrying express matter on those lines?

A. Yes, sir.

Q. You gave a reason for excluding some eight or ten railroads, not included in your computation, and the reason was that the revenue was so small that it would just have complicated the formula; is that correct?

A. Yes.

[fol. 38] Q. Did you assume the same procedure in regard to the airlines that operate in and operate out of Virginia?

A. There are other airlines that come into Virginia at the Washington Airport, and they have no substantial mileage in Virginia, and for that reason that was assumed.

Commissioner Catterall: Where did you get the figures of money taken in by the Express Company and paid by the Express Company to the railroads? From what source did you derive those figures?

A. That information was gotten from the annual operating report of the Railway Express Agency to the State Corporation Commission.

Mr. Elliott:

Q. That is Exhibit 9 and Exhibit 9-A?

A. Yes, sir.

Commissioner Catterall: You may stand aside, Mr. Dickerson.

Witness stood aside.

Commissioner Catterall: Is there anything further?

Mr. Elliott: That is all.

Commissioner Catterall: Mr. Gay, do you want to make your oral argument now, or when you file your Brief?

Mr. Gay: I would like to make it at the time we file our Brief.

Commissioner Catterall: Do you want the record to be written up before you file your Brief?

Mr. Gay: Give us a minute on that, please.

Note: The Commission recesses for five minutes.

Mr. Gay: We are in agreement that it should be preferable to have the record transcribed and set a date for the

oral argument for, say, some day when we will provide the Commission with a copy of our Brief.

Commissioner Catterall: In view of the fact that we don't know when the record will be completed, counsel can get together and agree on a date to file Briefs. The record will not be ready before January twentieth.

Mr. Gray: Is it contemplated that they will file their Brief first, and then we will reply to it?  
[fol. 39]. Commissioner Catterall: Mr. Gay, will you file your Brief, and then they reply to that?

Mr. Gay: Mr. Gray is correct that we should give him a copy of our Brief, and then he will have an opportunity to reply.

Commissioner Catterall: The first open date we have is February twenty-first. That would give you plenty of time to get the record and write your Brief and the Commonwealth reply to it.

Mr. Gay: That will be February twenty-first at 10:00 A. M.?

Commissioner Catterall: Yes.

Mr. Gay: If Mrs. Wootton gives us the record by January twentieth, I will give counsel my Brief within ten days thereafter, and they can give me their Brief within ten days thereafter.

#### BEFORE THE STATE CORPORATION COMMISSION

#### Transcript of Hearing of February 4, 1957

Present: Ralph T. Catterall (Chairman,) H. Lester Hooker, W. Marshall King.

(Chairman Catterall presiding.)

APPEARANCES: Thomas B. Gay and H. M. Pasco, Counsel for Railway Express Agency, Inc.

Norman S. Elliott, Counsel for State Corporation Commission.

Margaret P. Wootton, Official Court Reporter, State Corporation Commission, Richmond, Virginia.



## COLLOQUY BETWEEN COMMISSION AND COUNSEL

Mr. Gay: May it please the Commission, I have the consent of counsel, Mr. Wilson, to draw to the Commission's attention a motion which the Railway Express Agency has filed in Case No. 13233, in connection with the application [fol. 40] for refund of franchise tax. The motion is returnable today and is in writing, and I would like to have the Commission set it down for hearing.

As I understand, this case today will not take all day——

Chairman Catterall: Is there any objection to the motion, Mr. Elliott?

Mr. Elliott: I don't have any objection to it. I talked with Mr. Gray briefly over the telephone about it, and he does not seem to have any objection, and I thought the situation had been entirely cured by the conferences we had in the Chairman's office in which certain deletions were made from the record, but it seems those agreements which were reached at that time were not satisfactory. As I recall, Mr. Gay stated that, if certain deletions were made that was all that was necessary.

Chairman Catterall: He said it was entirely satisfactory to handle it in that way, but now he has a different idea and wants the record to show a piece of evidence that he would have shown had he thought of it then. Mr. Gay wants to amplify the record in the Railway Express Agency's refund case by placing in the record an affidavit or a statement of what the taxes would have been on the refrigerator cars owned by the Railway Express Agency if, during the past five years, the Commission had imposed any such tax; and I don't see any objection to putting that in at this late date, because he could have put it in at the time of the hearing, so I don't see that we need any further argument on it.

Mr. Gay: Do I understand that the motion is granted?

Chairman Catterall: The motion is granted, and the addendum in the form of an affidavit of Mr. Waldrop with two exhibits attached will be received as evidence in this case as Exhibit No. 13, and the Bailiff will stamp the number on the exhibit.

Mr. Elliott, did you call Mr. Gray this morning?

Mr. Elliott: Yes, sir. He said he had not had a chance to look it over completely, but if I had no objections, he had no objections.

Chairman Catterall: Simply putting in the exhibit does not mean that we pass on the materiality of it.

Mr. Gay: I understand the original of the motion is in the hands of one of the Commissioners, and a copy of it is here on file.

Chairman Catterall: I will give it to Mr. Pollard, and he will mark it with the appropriate exhibit number.

The Commission will recess for five minutes.

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[fol. 41] BEFORE THE STATE CORPORATION COMMISSION

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### Application of

RAILWAY EXPRESS AGENCY, INCORPORATED

ORDER DENYING MOTION FOR CORRECTION AND REFUND—  
March 1, 1957

For correction of assessment of a franchise tax for the year 1956 and for a refund of such tax.

This Proceeding was heard by the Commission on December 17, 1956 and February 21, 1957 and taken under advisement. The applicant, Railway Express Agency, Incorporated, was represented by Thomas B. Gay, H. Merrill Pasco and W. M. Waldrop, Jr., its counsel, the Commonwealth of Virginia by Frederick T. Gray, Special Assistant to the Attorney General and the State Corporation Commission by its Counsel.

Now on This Day, briefs having been filed by the parties, and the Commission having considered the evidence, the argument of counsel, and briefs submitted by counsel, is of the opinion and finds for reasons stated in an opinion this day filed herein by Catterall, Chairman and concurred in by Hooker and King, Commissioners that the relief requested in the application filed herein should be denied.

# It Is Therefore, Ordered:

(1) That the application of Railway Express Agency, Incorporated for correction and refund of the franchise tax assessed by the Commission for the year 1956 pursuant to Article 4 of Chapter 12 of Title 58 of the Code, as amended, be denied and this proceeding be dropped from the docket; and

(2) That two attested copies hereof together with two copies of the opinion referred to herein be sent to Thomas B. Gay, counsel for the applicant and one attested copy hereof and a copy of said opinion be sent to the Attorney General of the Commonwealth, to Frederick T. Gray, Special Assistant to the Attorney General and to the Director of the Division of Public Service Taxation.

A True Copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

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[fol. 42] BEFORE THE STATE CORPORATION COMMISSION

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Application of RAILWAY EXPRESS AGENCY, INCORPORATED  
For refund of 1956 Franchise Tax.

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OPINION—March 1, 1957

Opinion, CATTERALL, *Chairman*.

For many years Railway Express paid its Virginia franchise tax under protest, but it took no steps to resist the tax until after the Supreme Court had announced its decision in the case of *Spector Motor Service v. O'Connor*, 340 U.S. 602. Inspired by the decision in that case, it petitioned for a refund and won in the Supreme Court by a vote of 5 to 4 in *Railway Express Agency v. Virginia*, 347 U.S. 359. The result was a substantial windfall for the Express Company at

the expense of the State of Virginia. The dissenting opinion pointed out (p. 371):

"As a result of the immunity given by today's decision, appellant and others similarly situated receive a windfall in the form of a valid claim for tax refunds extending back as far as limitations will permit. This is the result of today's twist to the Spector doctrine \* \* \* This approach is rather hard on the states and creates additional obstacles for them in their continuing effort to make purely interstate business units pay a fair share of the cost of state facilities and services essential to the functioning of these enterprises."

The court's decision cost the state about \$600,000 in taxes; and the General Assembly at its next session passed the statute now under attack. The new statute makes two changes in the law designed to overcome objections based on the commerce clause of the federal constitution. The new statute, instead of calling the tax a privilege tax, describes it as a property tax. The new tax, which is a tax on the going concern value of the business, is imposed in lieu of certain other property taxes.

Evidence was taken on December 17, 1956. Thereafter, briefs were filed and oral argument was presented. Robert [fol. 43] S. Fletcher, W. H. Waldrop, Jr., Thomas B. Gay and H. Merrill Pasco appeared for the taxpayer. Frederick T. Gray, by special appointment by the Attorney General, appeared for the Commonwealth; and Norman S. Elliott for the Commission.

Although the words of the Constitution to be construed in this case are few and simple, they have given rise to much controversy and misunderstanding. Those words are:

"The Congress shall have Power \* \* \* To regulate Commerce \* \* \* among the several States, \* \* \*"

At first blush, it is hard to see how those words could have any bearing on this case. The words confer power on Congress; and Congress has passed no law that could apply here. The words do not purport to limit the powers of the states; and, when we examine the Constitution as a whole, we find that when the Framers meant to restrict the rights

of the states they used express language to say so. By following that practice, they manifested their understanding that conferring a power on Congress did not *ipso facto* deny it to the states. For example, the Constitution gives Congress power to coin money, to declare war and to raise armies. It gives the President power to make treaties. The Framers thought that that alone would not operate to keep the states from coining money, declaring war, raising armies and making treaties. They considered it necessary to add:

“No State shall enter into any Treaty, \* \* \* coin Money  
\* \* \*

“No State shall, without the Consent of Congress, \* \* \*  
keep Troops, or Ships of War in time of Peace \* \* \* or en-  
gage in War \* \* \*”

Granting to Congress the power to lay and collect taxes and to borrow money did not keep the states from doing the same thing. Giving Congress the power to pass “uniform Laws on the subject of Bankruptcies” did not automatically deprive the states of power to pass bankruptcy laws. *Butler v. Goreley*, 146 U.S. 303, 36 L. ed. 981. Only the Commerce Clause has been given this peculiar interpretation. It alone diminishes the rights of the states without saying so. In all other instances state laws are valid unless they conflict with an affirmative prohibition in the Constitution or a constitutional Act of Congress.

How did this peculiar situation come about?

In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, Daniel Webster argued (p. 13):

[fol. 44] “He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several states to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several states, respectively, but the commerce of the United States. Henceforth, the commerce of the states was to be *an unit*, and



the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. Its character was to be described in the flag which waved over it, *E Pluribus Unum*. Now, how could individual states assert a right of concurrent legislation, in a case of this sort without manifest encroachment and confusion. It should be repeated that the words used in the constitution, 'to regulate commerce' are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires."

And Chief Justice Marshall agreed with him (p. 209):

"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

"There is great force in this argument, and the court is not satisfied that it has been refuted."

All that counsel and the court said on that interesting subject was unnecessary to the decision, because *Gibbons* had a federal license duly issued under an Act of Congress with which the state statute conflicted.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, involved the clause of the Constitution which forbids the states in express terms to "lay any imposts or duties on imports." Chief [fol. 45] Justice Marshall used the occasion to expand his theory of the self-executing effect of the Commerce Clause by asserting that there is no difference between interfering with a regulation made by Congress and interfering with the power of Congress to make the regulation.

At page 448, speaking of state duties on imports he says:

"It is too obvious for controversy, that they interfere equally with the power to regulate commerce."

And,

"We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

The fallacy of what the Chief Justice maintains ought to be "too obvious for controversy." A state law in conflict with a valid federal regulation is of course void. For that very reason, a state law that does *not* conflict with any federal regulation, could not possibly interfere with the power of Congress to regulate.

These dicta of the great Chief Justice are the little acorns from which have grown the impenetrable forest of decisions on the question of when the states may or may not tax or regulate interstate commerce. For the rule is not absolute. Webster, in his argument quoted above, pointed out that, in the nature of things, the rule could not be absolute. The correct statement of the rule we are considering is: "Sometimes, the states may not regulate or tax commerce among the states."

The Framers of the Constitution *did* not, and must have seen that they *could* not, impose a blanket prohibition against state regulation of interstate commerce. At that time the only law that regulated interstate commerce was state law. To abolish that law overnight by constitutional mandate would have left the whole field without law until Congress got around to legislating on it. It is quite true, as Marshall repeatedly points out, that the main reason for junking the Articles of Confederation was to confer on the central government the power to regulate interstate and foreign commerce. The Constitutional Convention solved the problem by giving Congress the power to regulate. Where regulation was needed, Congress was to adopt regulations. Until Congress acted, state regulations were to remain in full force and effect. That plan was not good enough for Webster and Marshall, and they worked out something better.

[fol. 46]. In staking out the line dividing the field in which the states were free to regulate from the field in which they

were forbidden to regulate, the court, of course, had to take each case as it came up, but felt obliged to lay down a general principle to explain what it was doing. That statement of principle, in *Cooley v. The Port Wardens*, 12 How. 299, 13 L. ed. 996, was (p. 319):

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The court has had occasion to quote that sentence many times. Sometimes, however, it varied one of the words in the quotation, and the change of that one word greatly changed the meaning of the quotation. For example, in the *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146, the court expressed the view that the rule in *Cooley* was clear, saying:

"However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

It will be observed that the word "ONLY" has been dropped from the declaration of the governing principle. The difference between the two methods of stating this cardinal rule of constitutional interpretation is almost as great as the difference between night and day. The omission of the word "only" after the word "admit" makes a big change in the meaning; and the most striking thing about the change is that the court did not notice that it had made a change. It was as if the court was under the mistaken impression that the sentence: "I eat spinach," means the same thing as: "I eat only spinach."

The contrast between the two methods of stating what the court considered to be the same thing is brought out by observing that practically everything *admits* of one uniform system of regulation and practically nothing *admits only* of one uniform system of regulation. The most conspicuous example of a regulation that, by absolute necessity, must be

uniform throughout the United States, is the rule that motor vehicles travelling in commerce must pass each other [fol. 47] on the right. If they passed on the right in Maine, on the left in New Hampshire, on the right in Massachusetts, on the left in Rhode Island, and so on down the coast, the consequences would be too awful to contemplate. Here, if anywhere, the court could be sure that the subject is in its nature national and admits only of one uniform system or plan of regulation; but the court has not forbidden the states to regulate this part of interstate commerce during the silence of Congress.

Thus it appears that this supposed rule that "has been asserted with great clearness" is not very clear and is not even a rule. There can be no disputing the court's pronouncement in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 420; that

" \* \* \* the history of the commerce clause has been one of very considerable judicial oscillation."

In *Southern Pacific Company v. Arizona*, 325 U.S. 761, 89 L. ed. 1915, we find the court debating the policy question of whether it is better to endanger the lives of brakemen on freight trains or of motorists at grade crossings. The brakemen lost, and Mr. Justice Black was moved to remark (p. 788):

" \* \* \* this Court to-day is acting as a 'super-legislature.' "

In *Morgan v. Virginia*, 328 U.S. 373, 90 L. ed. 1317, he said (concurring at page 386):

"The Commerce Clause of the Constitution provides that 'Congress shall have power \* \* \* to regulate commerce \* \* \* among the several States.' I have believed, and still believe that this provision means that Congress can regulate commerce and that the courts cannot. But in a series of cases decided in recent years this Court over my protest has held that the Commerce Clause justifies this Court in nullifying state legislation which this Court concludes imposes as 'undue burden' on interstate commerce. I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress."

The unenviable situation of an inferior court in deciding cases involving state regulation and taxation of interstate commerce is that it frequently cannot tell which way the Supreme Court will oscillate next. For, after all, it is not the last decision of the Supreme Court that governs the pending case, but the next decision; and the outcome of these commerce clause cases turns not on any rule of law but on how the facts of each particular case impress a majority of the Justices. In *Railway Express Agency v. Virginia*, 347 U.S. 359, 98 L. ed. 757, a bare majority of the court reached the conclusion that the Virginia tax on the express company was too heavy a burden on interstate commerce.

The peculiar feature of this case is that the *Railway Express Agency does no intrastate business in Virginia*. It does both kinds of business in all the other states. If it had done any intrastate business in Virginia, the decision would have gone the other way. If the case had come up from any state but Virginia, a statute in the same words as the Virginia statute would have been held constitutional. If the taxpayer had done \$10 worth of business intrastate in Virginia, it would have had to pay the tax on all its interstate business in Virginia, although the burden on interstate commerce would have been the same in both cases. When we remember that it is a constitution we are construing, and when we observe that the dividing line between what the states may and may not do is drawn by the judges on considerations of policy by balancing the national interest in free movement against the local interest in regulating local affairs, it is wonderful that so fine and technical a line could be drawn: a line that bears no relation to the supposed reason for drawing a line.

The unbelievably narrow line separating a good statute from a bad one is illustrated by comparing the *Railway Express* case with the *Steamboat* cases. The Virginia statute imposing a gross receipts tax on steamboat companies was almost word for word the same as the Virginia statute imposing a gross receipts tax on express companies. There was no material difference in the law, and the only significant difference in the facts was that the steamboat companies did a little intrastate business. In the *Steamboat* cases the Supreme Court dismissed without opinion the



appeal from the Supreme Court of Appeals of Virginia. In *Railway Express Agency v. Virginia*, 247 U.S. 359, the court explained the difference between the *Express Company* case and the *Steamboat* cases as follows (p. 368):

"The Supreme Court of Appeals placed reliance upon our dismissal of the appeals in *Baltimore Steam Packet Co. v. Virginia*, 343 U.S. 923, 96 L. ed. 1335, 72 S. Ct. 763, and *Norfolk B. & C. Line, Inc. v. Virginia*, 343 U.S. 923, 96 L. ed. [fol. 49] 1335, 72 S. Ct. 764, and may well have been misled, since we assigned no reasons and cited no authority. In those cases, the Virginia court held an almost identical tax to be a property tax. *Commonwealth v. Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. (2d) 137. But a vital distinction, so far as our jurisdiction is concerned, will account for dismissal of the appeals. One of those appellants was a Virginia corporation and derived its privilege to exist from that State. Both were engaged in intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State. For our purposes, it mattered not whether the right to tax was based on those companies' privileges or on their property, since they were taxable on either basis. This fact distinguishes those dismissed cases from the one at bar and from *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L. ed. 573, 71 S. Ct. 508, *supra*."

"A vital distinction," as that phrase is used by the court, means a distinction that makes the difference between constitutionality and unconstitutionality. That vital distinction, says the court, is: "One of those appellants was a Virginia corporation \* \* \* Both were engaged in intrastate as well as interstate commerce \* \* \*"

Apparently there were two vital distinctions. The Norfolk, Baltimore and Carolina Line was a Virginia corporation. If that be a vital distinction between it and Railway Express Agency, the holding of the court is that if Railway Express Agency had been a Virginia corporation it would have had to pay the tax. But the burden on interstate commerce is exactly the same whether the taxpayer is incorporated in Delaware or in Virginia.

That distinction did not exist in the case of the Baltimore Steam Packet Company. The taxpayer, like Railway Express Agency, was a foreign corporation. Consequently, the only difference between those two corporations was that Baltimore Steam Packet Company did a little intrastate business in Virginia.

In the *Baltimore Steam Packet* case the tax on gross receipts was computed on the fraction of total receipts that the miles travelled in Virginia bore to the total miles travelled. Under that allocation, the gross receipts earned in Virginia from both kinds of business was \$1,158,000. Of that amount the gross receipts from transportation intrastate between Virginia ports was \$2,287. The tax on the allocated interstate receipts was \$18,981.20. The tax on the intrastate receipts was \$34.31. So the vital distinction, the [fol. 50] difference between good and bad, is that the Steamboat Company must pay on all earnings derived from operations within the geographical boundaries of Virginia, because, and only because, *one-fifth of one percent* of those operations involved movement from one point to another within those boundaries. Because it had those *gross* receipts of \$2,287 (from which the net earnings, if any, can not have been much) it was required by the Supreme Court of the United States to pay a tax of \$19,000. It so happened that the tax held constitutional was 800% of the gross income that alone served to make it constitutional. That was not a borderline case. It was such a clear case that the Supreme Court dismissed the appeal without wasting time on oral argument. There can be no constitutional difference between \$2,287.00 and \$2.28 unless the court is prepared to draw a new line and declare that what the Framers really meant when they gave Congress power to regulate commerce was that a state tax on the privilege of engaging in interstate commerce is valid if the taxpayer does intrastate business of \$2,287 but void if its gross intrastate earnings are only \$2,286.

The "vital distinction" relied on by the Supreme Court to distinguish the *Baltimore Steam Packet* case from the *Railway Express* case was that one foreign corporation had no gross earnings in Virginia intrastate business and the other had \$2,287 of such earnings. On that basis alone the

two cases look pretty much alike. Actually, however, when all the facts of both cases are considered, they are even more alike. It is true that the express company does no intrastate business in Virginia; but it owns all the stock of a subsidiary Virginia corporation that does do business in Virginia; and the gross receipts of that subsidiary are more than \$2,287. The steamship company did all its business, interstate and intrastate, in the same steamboats manned by the same crews. The two express companies do all their business, interstate and intrastate, in the same trucks operated by the same drivers. The net earnings of Railway Express Agency of Virginia go into the pocket of the parent company, the Delaware corporation. Looking at the physical aspects of the express business and of the steamship business no relevant differences can be perceived by the naked eye. The only difference left, when all the facts are considered, is that the steamship company earned the fatal 2,287 intrastate dollars through servants employed by it; and the two express companies earned more than 2,287 intrastate dollars through servants employed by them jointly. The express business is one business carried on by two corporations, one of which owns the other.

[fol. 51] The court's opinion in *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, begins with the lament:

"This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them."

The states have to collect taxes if they are to continue to exist as members of this indissoluble union of indestructible states, and, since most commerce is interstate commerce they have to make interstate commerce pay its way. The federal government, through its duly constituted legislative body, has practically absorbed the field of income taxes, and through its supreme judicial body has restricted other sources of state tax revenue. The duty of self preservation forces the states to press against the barriers erected by the Supreme Court, and so long as those barriers are endlessly shifting the problems will continue to be endless. The problems are endless because the super-

structure erected by the court on Marshall's dicta is not based on logic. If the first premise of an argument is not logical nothing that follows can be entirely satisfying. The most striking example of this occurs in the court's unsuccessful efforts to explain how it happens that an Act of Congress can confer on the states powers that the Constitution forbids them to exercise. If it were true that the Commerce Clause, by its own unaided force and effect, forbids the states to regulate insurance, Congress could no more authorize the states to regulate the insurance business (*Prudential Insurance Co. v. Benjamin*, 328 U. S. 408) than it could authorize them to pass bills of attainder. The only way out of this logical dead end is to recognize that it is not the constitution but the court that forbids the states to regulate and tax interstate commerce in fields not occupied by any Act of Congress. The key to the riddle is the first line of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."

No friend of states rights could be optimistic enough to expect the court to give up the power it has so long exercised of striking down state laws that, in its judgment, go too far in taxing interstate commerce. The most that can be seriously hoped for is that the court will decide close cases in favor of the states. The burden of the argument up to this point is that, if the Virginia tax on steamship lines was obviously valid, the old Virginia tax on express companies, which differed by less than a hair's breadth from the Virginia tax on steamship lines, was almost [fol. 52] obviously valid. If the steamship tax was clearly valid, the express company tax could not be void beyond a reasonable doubt, and *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, ought to be overruled.

The remainder of this opinion will deal with the two changes made by the 1956 statute. The first change was to bring the state legislature in line with the state court in treating this tax as a tax on property.

The fatal defect in the Virginia statute held unconstitutional in *Railway Express Agency* was that five Justices found that the tax was on a privilege and not on property. The manner in which the five Justices dealt with the tax is accurately described by the four Justices who dissented (347 U. S., 370):



"The Supreme Court of Appeals of Virginia has held that the instant tax is an *ad valorem* tax on intangible property; the 'operating incidence' of the tax has been labeled the 'going concern' value of appellant's physical assets in Virginia. The state court specifically held that the tax 'is not a tax upon the privilege of carrying on a business exclusively interstate in character \* \* \*' 194 Va. 757, 760, 761, 75 S. E. (2d) 61. Hence, if we accept the determination of the state court, there is little question but that the tax is valid even under Spector.

"This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same 'privilege' label that condemned the tax in Spector. Although the Court refused to pierce the label in Spector, I do not dispute its right to re-examine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. But neither fact justifies the Court's refusal to accept the determination of the state court in this case. The name given the tax by the Virginia court meshes with the state's taxing scheme. And I do not believe that the Virginia court deliberately mislabeled the tax. Indeed, the holding of the state court is perfectly consistent with its earlier expressions on the subject and those of the State Corporation Commission, some antedating Spector. *Commonwealth v. Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. (2d) 137 (1951), *app dismd* 343 U. S. 923, 96 L. ed. 1335, 72 S. Ct. 763, 764 (1952); *Richmond v. Commonwealth* 188 Va., 600, 50 S. E. (2d) 654 (1948). Moreover, this Court does not question the existence of a going-concern value aside from the value of a business unit's physical assets."

[fol. 53] Beginning with railroads in 1902, when its present constitution was adopted, it has been the policy of Virginia to impose gross receipts taxes instead of income taxes on public utilities. From the beginning those taxes have been looked on as property taxes no matter what they were called.



Sec. 177 of the Virginia Constitution imposes "an annual State franchise tax" on railroads measured by gross receipts "for the privilege of exercising its franchise in this State . . . ."

Sec. 178 allocates the tax on interstate railroads:

"By ascertaining the average gross transportation receipts per mile over its whole extent, within and without this State, and multiplying the result by the number of miles operated within this State; provided that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other states over similar facilities or advantages in this State."

If the tax were not a tax on property there could be no reason to adjust the tax when the value of out-of-state terminals so exceeded the value of in-state terminals as to indicate that the relationship of in-state mileage to out-of-state mileage was not a fair test of relative property values.

Sec. 170 says:

"The General Assembly . . . may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property . . . ."

If a franchise tax were not a tax on property it could not be imposed in lieu of a tax on "other" property. Although franchise taxes were *called* taxes on a privilege, they in fact were considered to be, and were, property taxes.

This system of taxing railroads, later extended to other public utilities, was presented to the Virginia Constitutional Convention of 1902 as a tax on property. The constitution itself (Sec. 177) imposed the tax on railroads. The taxes on other companies were left to the legislature. In explaining the proposed system to the Convention, Mr. C. V. Meredith, presenting the report of the Committee on Taxation and Finance, said at page 2857 of the Debates:

"It is true that there is a difference between a tax upon a franchise and a tax upon capital. A franchise tax may

embrace all the capital or it may embrace only a portion of it. The system which we hope to see adopted in this [fol. 54] State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at;"

"I call your attention to the fact that it is our desire and hope that the Legislature will see fit to levy a system of franchise taxes by which the entire property of a corporation will be gotten at, and that it will levy a tax on the entire property. If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. Why? You know that a share of stock is not a debt. There is nobody from whom you can collect it. You are entitled to no interest on it. It is simply your title deed to your share in the corporation. It simply represents the interest which you have in this property which we propose to tax under the franchise system, if the Legislature does its duty, which we suppose it will."

*Great Northern Railway Co. v. Minnesota*, 278 U. S. 503, involved a gross receipts tax on railroads. The tax on interstate receipts was imposed "in proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done." The court said (p. 507):

"The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state."

If a tax on the gross receipts of a railroad is a property tax, it would seem to follow that a tax on the gross receipts of an express company would be a property tax. And if

it is a property tax it ought to remain a property tax no matter what it is called. However, five Justices of the Supreme Court have held that the old Virginia tax on express companies was a privilege tax. The last sentence of the opinion of the four dissenting Justices is (347 U. S., 372):

[fol. 55] "The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval."

The Virginia legislature, in passing the new law, has not only used the tax language most likely to meet the court's approval, but has made the new tax in lieu of other property taxes. Sec. 171 of the Virginia constitution provides:

"No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or reassessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

Local taxes on the real and tangible property of railroads, express companies and other utilities are levied by the localities on the basis of assessments made by the State Corporation Commission. In making the assessments the Commission considers only the value of the physical property, its bare bones value without any going concern value, because the going concern value is intangible property subject to taxation by the state and not by the locality. Because of the known propensity of local taxing authorities to combine low assessments with high rates, this Commission, for the protection of the utilities, assesses the physical property of state-wide utilities at 40% of its appraised value. The City of Richmond, claiming that this method of 40% assessment was unfair to it, appealed to the Supreme Court of Appeals of Virginia. *Richmond v.*

*Commonwealth*, 188 Va. 600; explains and upholds this method of assessment.

Sec. 171 of the Constitution, quoted above, permits the state to tax "the rolling stock of public service corporations." In the case of a public service corporation like an express company its rolling stock consists mainly of motor vehicles. The property tax on the automotive equipment of motor vehicle common carriers is assessed by the Commission under §§ 58-618 to 58-626.1 of the Code of Virginia. The history and interpretation of that tax are given in *East Coast Freight Lines v. Richmond*, 194 Va. 517.

Counsel for the express company argues that § 58-9 of the Code of Virginia permits the localities to tax the [fol. 56] express company's motor vehicles and that the 1956 franchise tax on express companies should not be construed to change that result by making the state franchise tax in lieu of that local property tax. The constitution of Virginia does not aggregate the rolling stock of any public service corporation to either state or local taxation. The express language of § 58-546 makes the franchise tax on express companies "in lieu of property taxes on its rolling stock." There can be no doubt that § 58-546 supersedes the part of § 58-9 relied on by counsel. In *East Coast Freight Lines v. Richmond*, 194 Va. 517 at 524 the court said:

"We concur in the opinion of the trial judge, 'that rolling stock of public service corporations is not the subject of any constitutional segregation,' and that no statutory segregation of rolling stock of a corporation of the character of the appellant has been pointed out. The only statutory segregation provided is that contained in § 58-9, Code of 1950, which segregates the rolling stock of railroads operated by steam, and § 58-624, which is, as we have pointed out, inapplicable to appellant because of § 58-626.1."

Next, counsel for the taxpayer argues that a tax on the intangible going concern value of a business cannot exceed a small fraction of the value of the physical property used in the business; and says that the tax in the present case is not a small fraction but a big one. But the going concern value of a business depends on the value of the busi-

ness as a going concern and not on the value of the land, machinery, equipment and tools used in the business. In *Adams Express Company v. Ohio*, 166 U. S. 185, 41 L. (ed.) 965, the court said:

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man."

. . . . .

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers, \$4,000,000 of tangible property scattered [fol. 57] through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000 and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise, or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

In the case before us the Delaware company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in the same vehicles with the same employees. If the parent company should transfer title to all the prop-



erty used in the business to the local company; it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts. In our opinion the tax is constitutional and the application for a refund is denied.

Hooker and King, *Commissioners*, concur.

[fol. 58]

BEFORE THE STATE CORPORATION COMMISSION

ORDER RE ORIGINAL EXHIBITS—March 29, 1957

For correction of assessment of a franchise tax for the year 1956 and for a refund of such tax.

Railway Express Agency, Incorporated, having filed due notice of appeal in this case,

It Is Ordered that all of the original exhibits filed with the evidence, numbered and described as follows, be certified and forwarded to the Clerk of the Supreme Court of Appeals of Virginia to be returned by the Clerk thereof to this Commission with the mandate of that Court:

## DESCRIPTION

*Exhibit No.*

- A. Letter, Oct. 18, 1956, to Counsel, State Corporation Commission, from Thomas B. Gay.
1. Standard Express Operations Agreement.
  2. Stipulation.
  3. Rejected. Railway Express Agency, Inc., taxes and assessments.
  4. Rejected. Railway Express Agency, Inc., taxes and assessments.
  5. Rejected. Railway Express Agency, Inc., of Delaware. Automotive equipment, 1956.
  6. Rejected. Railway Express Agency, Inc., of Virginia, taxes and assessments.
- [fol. 59]
7. Cancelled check.
  8. Notice of State Taxes Assessed for 1956.
  - 9.\* \*These exhibits, documents in the files of the
  - 9A.\* State Corporation Commission, were not to
  - 10.\* go the record but numbers were given to them
  - 11.\* with the privilege for either party to take any excerpts or data from any of them and insert same as the exhibit for that particular number. No excerpts or data were presented for insertion, except excerpts from Exhibit No. 10, now identified by signature of the Chairman.
  12. Form. Annual report of express companies to the State Corporation Commission.
  13. Motion of Railway Express Agency, Inc., to supplement the record.

END

A True Copy.

Teste: N. W. Atkinson, Clerk of the State Corporation Commission.

CHAIRMAN'S CERTIFICATE TO RECORD AND EXHIBITS  
(omitted in printing)

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[fol. 60]

CLERK'S CERTIFICATE TO NOTICE OF APPEAL—April 1, 1957

I, N. W. Atkinson, Clerk of the State Corporation Commission, certify that within sixty days after the final order in this case Railway Express Agency, Incorporated, by Hunton, Williams, Gay, Moore and Powell, its Attorney, Electric Building, Richmond 12, Virginia, filed with me a notice of appeal therein which had been delivered to Counsel for the State Corporation Commission and to the Attorney General of Virginia, there being no opposing counsel, pursuant to the provisions of Section 13 of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia.

Subscribed at Richmond, Virginia, April 1, 1957.

N. W. Atkinson,

H. G. Turner, Clerk.  
Clerk.

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[fol. 61]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA  
AT RICHMOND

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RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of the  
State Corporation Commission, Appellee.

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PETITION FOR AN APPEAL FROM AN ORDER OF THE STATE  
CORPORATION COMMISSION—Received April 10, 1957

To the Honorable Justices of the Supreme  
Court of Appeals of Virginia:

Railway Express Agency, Incorporated, a Delaware corporation, respectfully represents that it is aggrieved by

the final order entered by the State Corporation Commission on March 1, 1957, in Case No. 13233, denying its application made pursuant to Section 58-672 of the Code of Virginia, 1950, for correction of assessment and refund of the franchise tax assessed and paid for the year 1956 in the amount of \$139,739.66 pursuant to Section 58-547 of the Code of Virginia, 1950, as amended. A copy of said order appears in the record of the proceedings before the State Corporation Commission in this matter presented with this petition.

On March 25, 1957, counsel for petitioner filed with the Clerk of the State Corporation Commission a notice of appeal which had been delivered to the Attorney General of Virginia, the special assistant to the Attorney General of Virginia and to counsel for the Commission.

[fol. 62] Since the appeal here is of right, no statement of facts, argument or assignments of error are made in this petition. There is filed herewith as a part hereof a certified copy of the record of the proceedings before the State Corporation Commission with exhibits.

Wherefore, petitioner respectfully prays that an appeal be awarded it and that this Honorable Court review and reverse the action of the State Corporation Commission and enter an order directing the correction of the assessment of and refunding the franchise tax paid by petitioner for the year 1956 in the amount stated with interest thereon from the date of payment thereof by petitioner in accordance with the prayer of the petition filed with the State Corporation Commission on October 18, 1956.

On April 10th, 1957, copies of this petition were mailed to J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, Frederick T. Gray, Special Assistant to the Attorney General of the Commonwealth of Virginia and to Norman S. Elliott, Counsel for the State Corporation Commission, prior to its being filed with the Clerk of this Honorable Court.

Respectfully submitted,

Railway Express Agency, Incorporated, by Thomas  
B. Gay, 1003 Electric Building, Richmond 12,  
Virginia, Its Attorney.

Robert J. Fletcher, William H. Waldrop, Jr., H. Merrill Pasco, of Counsel.

I, Thomas B. Gay, the undersigned counsel duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order of the State Corporation Commission in the above case is erroneous and that said order should be reviewed and reversed.

Given under my hand this 10th day of April, 1957.

Thomas B. Gay, 1003 Electric Building, Richmond  
12, Virginia.

[fol. 64]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4742

RAILWAY EXPRESS AGENCY, INCORPORATED,

v.

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN—  
December 2, 1957

FROM THE STATE CORPORATION COMMISSION

This is an appeal from an order of the State Corporation Commission which denied the application of the appellant made under § 58-672 of the Code for correction and refund of the franchise tax assessed against it by the Commission for the year 1956, pursuant to amended Article 4, Chapter 12, Title 58, § 58-546 through § 58-555 of the Code, as amended by Acts 1956, ch. 612, p. 964. The Code sections material to this controversy appear below.<sup>1</sup> In its

<sup>1</sup> "§ 58-546. Franchise tax on express companies.—Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which



opinion filed in support of its order, as required by § 156 (f) of the Virginia Constitution, the Commission held that the tax imposed by these sections was a property tax on [fol. 65] intangible property of the appellant, in lieu of other property taxes, and not prohibited by the United States Constitution.

In its Annual Report for 1956, required by the Commission pursuant to § 58-548, the appellant, in response to the inquiry on the form furnished it by the Commission as to what receipts were by it "earned in Virginia on business passing through, into or out of this State," answered

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shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

"§ 58-547. Amount of franchise tax.—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

"§ 58-548. Annual report.—Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding."

"§ 58-549. Assessments by Commission.—The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of the real estate and tangible personal property other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers."

"§ 58-553. No other taxes on express companies; exceptions.—The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies, except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law, or the annual registration fee."

"None", and attached a statement saying, in part, "This Company does solely an interstate express business in Virginia and has no way of determining what part of the [fol. 66] receipts derived by it from such business was earned 'in business passing through, into or out of this State'."

The Commission thereupon, as directed by § 58-549, proceeded to "make the assessments upon the best and most reliable information that it can procure". By a method of calculation shown in the record it determined the appellant's gross receipts from business passing through, into or out of Virginia by computing on a mileage basis the proportion which its receipts from express transported by it over six railroads (omitting ten others because *de minimis*) and five airlines operating in Virginia bore to the total receipts from express transported by the appellant over the entire lines of these carriers. The amount so ascertained as gross receipts earned in Virginia was \$6,499,519, to which the .215% rate fixed by § 58-547 was applied, resulting in the tax of \$139,739.66 assessed by the Commission against the appellant, of which it now complains.

The appellant, which will sometimes be referred to herein as the Delaware Company, was incorporated in Delaware in 1928, and does an express business in all of the States of the Union, interstate in all, and intrastate in all except Virginia. Because of the provision of § 163 of the Virginia [fol. 67] Constitution it was denied a certificate to engage in intrastate express business in this State.<sup>2</sup> The Delaware Company has a contract with 68 railroads which own its entire capital stock, and 109 non-stockowning railroads which gives it the exclusive right and privilege to conduct express transportation business over their lines, including those operating in Virginia.

In 1931 the Delaware Company caused to be chartered and organized under the laws of Virginia the Railway Express Agency, Incorporated, of Virginia, for the purpose of conducting a purely intrastate express business in

<sup>2</sup> *Railway Express Agency, Inc. v. Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. ed. 450.

Virginia. The Delaware Company owns all the stock of the Virginia Company and in 1932 entered into a contract with it by which the Virginia Company agreed to conduct the intrastate business in Virginia on the lines of the railroads named by the Delaware Company, and to perform the obligations of the latter company with its contracting carriers concerning intrastate operations in Virginia. The contract provided for joint use by the two companies of real and personal property, equipment and employees.

On the hearing before the Commission it was stipulated [fol. 68] that the Delaware Company "conducts an express business in interstate commerce and intrastate commerce in each of the states of the United States with the exception of Virginia, in which it conducts only an interstate business," and that the Virginia Company "conducts solely an intrastate business in the State of Virginia".

Under its assignments of error on this appeal the appellant contends: (1) that § 170 of the Virginia Constitution does not authorize the imposition of this tax; that § 58-546 does not impose it; that § 58-547 provides no adequate method for determining gross receipts from interstate commerce and does not authorize the method employed by the Commission; (2) that the tax imposed is not a property tax as held by the Commission, but a tax levied upon the privilege of doing an interstate business in Virginia and hence invalid; (3) that the Commission should not have classified appellant's automotive equipment and trucks as rolling stock; and (4) that the Commission erred in rejecting as immaterial some of appellant's offered exhibits.

First. Section 170 of the Virginia Constitution provides that the General Assembly "may impose State franchise taxes," and may "make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation". Appellant's argument [fol. 69] is that this should be construed to mean only domestic transportation corporations and not applied to the appellant which as a foreign corporation has been denied authority to do intrastate express business in Virginia. We do not agree. Section 170 authorizes the imposition of a franchise tax on transportation companies. The

appellant is a transportation company, so defined by § 153 of the Constitution. It owns property and does an interstate express business in Virginia. Section 158 of the Constitution says that all property, except as in the Constitution provided, shall be taxed. Certainly no exception of foreign transportation companies is in terms made in § 170 nor do we think that such an exception can be fairly inferred. Limitation on the power of the legislature to impose the tax would have to proceed from a prohibition in the Constitution, not from absence of conferred authority. The powers of the legislature are plenary except as restrained by the Constitution. 4 Mich. Jur., Constitutional Law, § 31, p. 114. We cannot say that our constitutional and statutory provisions were not intended to and do not apply to the appellant, as was said in *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549, to be true of the provisions of the Alabama Constitution and laws [fol. 70] under former decisions to the effect that a foreign corporation doing an exclusively interstate business in Alabama does not "do any business in this state."<sup>3</sup>

Section 58-546 provides that "Each express company" doing business in this State shall pay a franchise tax in

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<sup>3</sup> *Commonwealth v. Appalachian Elec. Power Co.*, 193 Va. 37, 68 S. E. 2d 122, not referred to in argument by either party in the present case, does not control decision here. That case involved the interpretation of § 58-602 of the Code imposing a tax on the money of "every corporation doing in this State" an electric utility business. The question was whether the legislature meant to tax the money of such corporation on deposit in another State and derived solely from and used in connection with operations in such other State. It was held that in view of the legislative history of the statute; the administrative practice, long undisturbed by the legislature, of not taxing such money; and the legislative intent expressed in cognate statutes, particularly the statute limiting the tax on money earned by railroad companies to the part earned in this State, it was not the purpose of § 58-602 to tax money earned and kept in another State. The sentence in that opinion, "Since section 163 of our Constitution forbids a foreign corporation to do a public service business in this State, the statute looks only to Virginia corporations which conduct a utility business in Virginia", is to be taken in its setting and confined to the statute there construed. It does not serve to change the meaning of the clear language and purpose of the Code sections now under review.



lieu of taxes on other intangible property and in lieu of property taxes on its rolling stock. Appellant is an express company doing business, interstate at least, in this State. Section 58-547 fixes the rate and provides that where operations are partly within and partly without the State, the gross receipts from operations in the State shall be all receipts on business beginning and ending within the State and all receipts from the transportation within this State of express transported through, into, or out of this [fol. 71] State. Appellant argues that in order for an express company to be subject to these provisions it must do either an intrastate business, or both an intrastate and interstate business, and since it does only an interstate business the statute does not apply to it. We are not impressed by the argument. Section 58-546 describes the corporations which must pay the tax, and § 58-547 only fixes the rate and provides how the gross receipts to which it applies shall be identified. We detect no purpose in the statute to exempt the appellant because it earns only one kind of the receipts referred to.

Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross receipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. It did that by the method above stated. It is a method frequently resorted to in the fields of Federal and State taxation and doubtless necessary in the administration of tax laws. As a method it is obviously authorized and seems generally considered legal.

Second. Is the tax imposed by amended sections 58-546 ff. a property tax as held by the Commission and contended by the Commonwealth, or is it only a tax on the privilege of conducting an interstate express business in Virginia as contended by the appellant?

In the cases of *Commonwealth v. Baltimore Steam Packet Co.* and *Commonwealth v. Norfolk, Baltimore and Carolina*



*Line, Inc.*, 193 Va. 55, 68 S. E. 2d 137, we held that the gross receipts tax imposed on the steamship companies pursuant to what was then § 58-575 of the Code was a property tax. We so held although the statutes there involved denominated the tax a license tax levied for the privilege of doing business in this State, and in addition to the annual registration fee and property tax levied by other statutes. We there reviewed a number of Supreme Court decisions and concluded therefrom that the tax so assessed was not invalid as being a tax upon the privilege of carrying on an exclusively interstate business, but one fairly apportioned to the business carried on within the State, and was in its derivation and substance a tax on an element of value of the physical properties not other- [fol. 73] wise taxed. Appeals from that decision were dismissed by the Supreme Court. *Baltimore Steam Packet Co. v. Commonwealth*, 343 U. S. 923, 72 S. Ct. 763, 96 L. ed. 1335; *Norfolk, Baltimore and Carolina Line, Inc. v. Commonwealth*, 343 U. S. 923, 72 S. Ct. 764, 96 L. ed. 1335.

Afterwards, in *Railway Express Agency, Inc. v. Commonwealth*, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757, the Supreme Court in a five to four decision reversed the holding of this court, 194 Va. 757, 75 S. E. 2d 61, that what was then § 58-547 of the Code, which imposed what that statute termed a license tax "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided," to be measured by the gross receipts from operations in this State, was a constitutionally valid property tax measured by the gross receipts from business done in Virginia.

The Supreme Court, in the majority opinion, said that the legislature had given a "trinity of characterizations to the tax," naming it "an annual license tax," "in addition to" the property tax levied by what was then the preceding § 58-546, and laid "for the privilege of doing business in this State," and "we can only regard this tax as being in fact and effect just what the Legislature said it was—a [fol. 74] privilege tax, and one that cannot be applied to an exclusively interstate business".

The dissenting Justices were of the opinion that the name given the tax by this court "meshes with the state's

taxing scheme," and was "perfectly consistent with its earlier expressions on the subject". The majority opinion said the court had sustained and would sustain the power of the State to tax, without discrimination, all property within its jurisdiction, and to include in its assessment "or to assess separately" the value added by the property's assemblage into a going business, "even if that business be solely interstate commerce".

In the present case we are dealing with statutes different from those before the Supreme Court in the former *Railway Express Agency* case. Present § 58-546 imposes only "a franchise tax which shall be in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock" (emphasis added). Section 58-547 provides that this franchise tax shall be equal to 2.15% of gross receipts derived from operations in this State. Section 58-551 permits the locality to impose a tax on real estate and tangible personal property other than rolling stock on the basis of the assessment thereof made by the [fol. 75] Commission for that purpose and at the same rate as imposed by the locality on the same kind of property. Section 58-553 provides that the taxes so imposed and authorized shall be in lieu of all other taxes and of all licenses on such companies, except the motor vehicle license or fuel tax prescribed by law or the annual registration fee.

As we pointed out in the *Steamship* cases, *supra*, our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of all public service corporations, providing for the imposition by local authorities of *ad valorem* taxes on tangible property on the basis of valuation fixed by the State Corporation Commission, and the imposition of a franchise tax measured by gross receipts for the support of the State government; and that in making the assessments of the tangible property for local taxation, the Commission must *exclude* such franchise value as may be inherent therein, with the result that only the "bare bones" value of such property is taxed by the localities, leaving the intangible or "going concern" value to be taxed by the State for the protection and services rendered by it. The statutes now under consideration fit

into and "mesh" with that scheme, and make plain; we think, the legislative intent, in keeping with the constitutional intent from which the legislation proceeded, that the franchise tax now imposed is in fact and effect a tax on intangible property of the company, of great value, which except for this franchise tax would be immune from the payment of any tax.

As stated by the Commission in its opinion, it has been the policy of Virginia since the adoption of its present Constitution in 1902 to impose franchise taxes measured by gross receipts instead of income taxes on public utilities. The Constitution itself (§ 177) imposed the tax on railroads and the tax on other companies was left to the legislature. When the proposed system was submitted to the Convention which formulated the Constitution, its Committee on Taxation and Finance reported in part:

" \* \* \* The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at; \* \* \* If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. \* \* \* " Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857.

[fol. 77] Consonant with the Committee's purpose, § 170 of the Constitution adopted by the Convention provides that the General Assembly "may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other* property". (Emphasis added.)

The fact that a franchise tax based on the gross receipts of a corporation is a tax on its intangible property was not created by the framers of the Virginia Constitution. More than six years before that Constitution was adopted

the Supreme Court of the United States had held to that effect in the case of *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683, and (on petition to rehear) 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965. The Ohio statute required express companies to file a return and to include therein "a statement of their entire gross receipts, from whatever source derived," and in taxing the value of the property in the State the assessing board was directed to be guided "by the value of the entire capital stock of said companies, and such other evidence and rules" as would lead to the true value of their property within the State, in proportion to the entire property of the companies, as determined by the value of the capital stock thereof and [fol. 78] the other evidence and rules. The assessing board fixed the value of the property of Adams Express Company to be taxed in Ohio at \$533,095.80. That company had reported the value of its real estate in Ohio at \$25,170 and its personal property, including moneys and credits, at \$42,065; its gross receipts from all sources within the State at \$282,181 and its 120,000 shares at \$140 to \$150 a share. The company contended that the market price of its shares afforded no reasonable basis for estimating the value of its property and that the scheme of taxation was illegal, was a tax on interstate commerce and a denial of Due Process and Equal Protection.

The court held that the value of the property of the company was not limited to its tangible items, but included its "unit of use and management," and that its horses, wagons, and furniture, its contracts for transportation facilities and the capital necessary to carry on the business, whether represented in tangible or intangible property in Ohio, "possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others," referring to railroad, telegraph and sleeping car [fol. 79] companies. The court said:

" \* \* \* The taxation is essentially a property tax, and, as such, not an interference with interstate commerce."

In the opinion denying a rehearing, 166 U. S. 185, 218-19, 17 S. Ct. 604, 605, 41 L. ed. 965, 977, the court said in reply



to the contention of the express companies that they had in the State only certain tangible personal property which must be valued as other like property and upon such value alone the assessment must be made:

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. \* \* \* Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?"

Again it was said: "If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value." 166 U. S. at 221, 17 S. Ct. at 606, 41 L. ed. at 978.

[fol. 80] " \* Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?" 166 U. S. at 225, 17 S. Ct. at 608, 41 L. ed. at 979.

*Great Northern Ry. Co. v. Minnesota*, 278 U. S. 503, 49 S. Ct. 191, 73 L. ed. 477, involved a Minnesota statute which imposed a tax, measured by gross receipts, upon all railroad companies, "in lieu of all taxes upon all of their property within the state". Of it the court said: "The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state." See also *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994; *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 32 S. Ct. 211, 56 L. ed. 459;



*Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823, 115 A. L. R. 944; *Canton R. Co. v. Rogan*, 340 U. S. 511, 71 S. Ct. 447, 95 L. ed. 488.

The appellant contends that if the franchise tax be considered a property tax the amount of it is out of proportion to its property in Virginia and reflects the value of property outside of Virginia, and it complains that the Commission made no dollars and cents valuation of the intangible or going concern value of the company's property. The appellant says that it reported the value of its [fol. 81] real and tangible personal property in Virginia for 1956 at \$458,565.16, and instead of determining the going concern value of that property, the Commission assessed a franchise tax on its gross receipts calculated to have been derived from business in this State.

It is to be remembered, however, that the appellant owns under its contracts the exclusive express privileges on 177 railroads of the country, as well as on truck lines, airlines and steamboat lines. From these contract privileges it earned in 1955, according to its Annual Report to the Commission, in gross operating revenues the sum of \$387,854,479, and paid to the carriers the net sum of in Virginia. These earnings added a large intangible value \$146,522,248. Part of this operating revenues was earned to the tangible value of the separate items of tangible properties in Virginia which were valued by the appellant at \$458,565.16. Based on the proportion of Virginia mileage to system mileage, as ascertained by the Commission, these express privileges on six railroads and five airlines in Virginia earned \$6,499,519 in 1955. Said the Supreme Court in *Adams Express Co. v. Ohio*, *supra*:

"The first question to be considered therefore is whether [fol. 82] there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man." 166 U. S. at 219-20, 17 S. Ct. at 605-6, 41 L. ed. at 977.

The going concern value of a business, as said by the Commission in its opinion, "depends on the value of the business as a going concern and not on the value of the land, machinery, equipment and tools used in the business." And it added:

"In the case before us the Delaware Company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in the same vehicles with the same employees. If the parent company should transfer title to all the property used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is [fol. 83] bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts."

The legislature, in the statutes set out above, provided that the tax should be equal to 2.15% of the gross receipts from operations in this State and in lieu of all other taxes on intangible property and in lieu of property tax on rolling stock. For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such

gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The Commission thereupon ascertained in the best way it could the amount of these gross receipts to be \$6,499,519. If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility [fol. 84] of an agreement about it as in prior years (*Railway Express Agency, Inc. v. Commonwealth*, 194 Va. 757, 75 S. E. 2d 61).

There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as *prima facie* correct, Constitution § 156 (f). It is not incredible that a property which produced gross earnings of \$6,000,000 in one year would have a value of that much.

In *Adams Express Co. v. Ohio*, *supra*, the court said it was suggested that the company might have "bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. \* \* \* It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, [fol. 85] it cannot complain if the state treats its property as all taxable." 166 U. S. at 222-3, 17 S. Ct. at 607, 41 L. ed. at 978.

Third. Appellant contends that the Commission, contrary to its former practice, classified its automotive equipment and trucks as rolling stock rather than as tangible personal property, thereby making the franchise tax displace a property tax on a larger value of the company's

properties. As stated, § 58-546 provides that the franchise tax is "in lieu of property taxes on its rolling stock" as well as in lieu of taxes on all intangibles. The appellant argues that its automotive equipment and trucks should still be treated by the Commission as tangible personal property as in former years, to be taxed by the localities. Section 171 of the Constitution provides that tangible personal property "except the rolling stock of public service corporations" shall be subject to local taxation only. The result of the Commission's action is to relieve appellant's automotive equipment and trucks of local taxation and also of State taxation except as their value is reflected in the franchise tax. This value is stated to be \$262,719.63.

The Commonwealth says that this question is collateral [fol. 86] to the issue here because this is a statutory proceeding to correct an erroneous assessment, not a proceeding to compel an assessment to be made. This is true, but considering the point on its merits we think the Commission was warranted if not required by the amended statutes to classify the automotive equipment and trucks as rolling stock. Under the Constitution, § 171, *supra*, the legislature has the right to impose a State tax on rolling stock. *East Coast Freight Lines v. Richmond*, 194 Va. 517, 74 S. E. 2d 283. It seems logical to classify the automotive equipment and trucks used by the appellant in transporting express as rolling stock. The legislature so classified similar property in Article 11, Chapter 12, Title 58 of the Code, which requires the Commission to assess the rolling stock of motor vehicle carriers, "which shall include all busses, trucks, tractor trucks, trailers and semi-trailers and all other equipment which it is reasonably proper to class as rolling stock \* \* \*". Having the right to tax rolling stock, the legislature clearly directed in § 58-546 that this type of tangible property should be relieved of any other taxation than that imposed by the franchise tax to be paid by the company.

Fourth. Appellant's remaining contention is that the [fol. 87] Commission erred in rejecting as immaterial its Exhibits 1 and 5 and so much of 3, 4 and 6 as did not relate to the year 1956.



Exhibit No. 1 was appellant's agreement with the railroads, offered to show that appellant's gross receipts were paid to the railroads after paying operating expenses and maintenance charges. Its annual report filed in the evidence showed that. No. 6 was a statement of the assessments and taxes of the Virginia Company, not the appellant, on its tangible and intangible property involved in its intrastate business from 1933 through 1956. No. 3 showed the gross receipts of the appellant from 1931 through 1956, except for 1954 and 1955, as determined by the Commission, together with other intangibles and tangible property and the tax imposed thereon for those years; No. 4, its tangible property, including automotive equipment and trucks, and the local taxes paid thereon for the years 1931-1956; No. 5, the number, cost and market value of its automotive equipment in the cities of the State for 1956. Appellant says these last three were material to its contention, dealt with in "Third" above, that its automotive equipment and trucks should have been assessed in 1956 as tangible property and not as rolling stock.

We agree with the Commission that these offered exhibits [fol. 88] were immaterial on the issue to which they were claimed to relate, i.e., whether the franchise tax for 1956 imposed by amended § 58-546 was unconstitutional. While the exhibits might well have been received as information, and are in the record before us and have been referred to in argument so far as considered useful, yet any materiality to the questions raised is remote if at all existent, and it was not reversible error to refuse them.

For the reasons stated we hold that the franchise tax in question is a property tax, not prohibited by the Commerce Clause or other clauses of the Constitution of the United States, and validly imposed by the amended sections of the Code referred to. The order of the State Corporation Commission appealed from is accordingly

*Affirmed.*



[fol. 89]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4742

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RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

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Upon an appeal of right from an order entered by the State Corporation Commission on the 1st day of March, 1957.

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JUDGMENT—December 2, 1957

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby affirmed, and that the appellant pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

Clerk.

[fol. 90]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA  
AT RICHMOND

Record No. 4742

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RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Received December 31, 1957

I. Notice is hereby given that Railway Express Agency, Incorporated, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of Virginia entered in this proceeding on December 2, 1957, affirming the decision of the State Corporation Commission of Virginia denying Appellant's application for correction of assessment of a franchise tax in the amount of \$139,739.66 for the year 1956 and for a refund of such tax with interest thereon from date of payment.

This appeal is taken pursuant to Section 28 U.S.C. § 1257(2).

[fol. 91] II. The Clerk will please prepare a transcript of the record in this proceeding, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The petition of Railway Express Agency, Incorporated to the State Corporation Commission seeking correction of the assessment and a refund of the franchise tax assessed and paid for the year 1956 pursuant to Section 58-547 of the Virginia Code (1950), as amended.

2. The order of the State Corporation Commission dated October 18, 1956 docketing proceedings and setting date

for hearing and the transcript of testimony of the hearing held December 17, 1956.

3. The order and opinion of the State Corporation Commission of Virginia dated March 1, 1957 and the order of the State Corporation Commission dated March 29, 1957 and the original exhibits referred to therein.

4. The petition of Railway Express Agency, Incorporated to the Supreme Court of Appeals of Virginia for an appeal from the order of the State Corporation Commission of March 1, 1957.

5. Appendix to Appellant's Opening Brief filed in the Supreme Court of Appeals containing excerpts from the original exhibits.

6. The opinion and judgment of the Supreme Court of Appeals of Virginia dated and filed December 2, 1957.

7. This notice of appeal.

[fol. 92] 8. All papers filed by the parties under the requirement and authority of Rule 12 of the Rules of the Supreme Court of the United States.

9. Your certificate certifying the correctness of the transcript.

III. The following questions are presented by this appeal:

1. Whether the amount of tax imposed upon Appellant for the year 1956 pursuant to Section 58-547 of the Code of Virginia, 1950, as amended by the 1956 session of the General Assembly of Virginia was determined by the State Corporation Commission in such a manner as to constitute a violation of Appellant's rights under the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

2. Whether such tax as imposed upon Appellant for the year 1956 is an excise or privilege tax upon Appellant's right to do solely an interstate express business in Vir-

ginia and therefore constitutes a violation of the commerce clause of the Constitution of the United States.

Thomas B. Gay, H. Merrill Pasco, Attorneys for  
Railway Express Agency, Incorporated, Appel-  
lant.

PROOF OF SERVICE (omitted in printing)

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[fol. 94]

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ORDER STAYING MANDATE—December 18, 1957

Upon motion of the Appellant, and for good cause shown, it is

Ordered that unless hereafter otherwise ordered by this Court or the Supreme Court of the United States, the issuance of the mandate of this Court herein be stayed until final disposition of this case by the Supreme Court of the United States provided that a notice of appeal herein is duly filed with the Clerk of this Court within thirty days after the date of this order.

Dated: December 18, 1957.

Edward W. Hudgins, Chief Justice, Supreme Court  
of Appeals of Virginia.

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[fol. 95]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ORDER RE ORIGINAL EXHIBITS—January 20, 1958

It appearing to the Court that the Railway Express Agency, Incorporated, has filed its notice of appeal to the Supreme Court of the United States from a final judgment entered herein on December 2, 1957, in the above-styled cause, and it being made to appear to the Court that



certain original exhibits consisting of the Annual Report of Railway Express Agency, Incorporated, to the State Corporation Commission of the State of Virginia for the year ending December 31, 1955, stipulation of counsel, tabulations of taxes and assessments, etc., were sent up to this Court to be used in the hearing on said appeal herein are necessary and proper to be inspected by the Supreme Court of the United States on the hearing of said appeal therein, it is ordered that the Clerk of this Court in transmitting to the Supreme Court of the United States a transcript of the record in this cause shall transmit with the said record the said original exhibits for use by that Court, and that the Clerk of that Court shall, when said appeal is disposed of, return them to the Clerk of this Court, who shall thereafter transmit them to the Clerk of the State Corporation Commission, all in accordance with Rule 12 of the Supreme Court of the United States.

[fol. 96] Clerk's Certificate to foregoing Transcript. (omitted in printing).

[fol. 96-A]

# SUPREME COURT OF THE UNITED STATES

[Title omitted]

## ORDER NOTING PROBABLE JURISDICTION—April 14, 1958

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and a total of one hour and a half is allowed for argument. The case is set for argument immediately following Nos. 606 and 763.

April 14, 1958.



[fol. 97]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

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**APPENDIX TO APPELLANT'S OPENING BRIEF  
CONTAINING CERTAIN EXHIBITS**

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[fol. 98]

EXCERPTS FROM EXHIBIT No. 1

**STANDARD  
EXPRESS OPERATIONS  
AGREEMENT**

**BETWEEN**

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**AND**

**RAILWAY EXPRESS AGENCY,  
INCORPORATED**

---

**EFFECTIVE MARCH 1, 1954**

[fol. 99]

**ARTICLE I**

\* \* \*

Section 12. It is the intent of this agreement that the Express Company shall have no net taxable income. To this end the accounts between the Express Company and the Rail Company for any calendar year shall be adjusted from time to time and prior to the time the Express Company files its Federal Income Tax Returns for such year, *in such a manner as to produce no net taxable income and such returns shall be filed on this basis.* In preparing such returns and making such adjustments, the Express Company shall use its best judgment in stating the accounts in a manner appropriate under applicable provisions of the Federal Internal Revenue laws. The accounts for any calendar year shall be further adjusted for such year at

any time within three years after the last day of such calendar year to reflect any further adjustments appropriate to bring such accounts into conformity with the applicable provisions of the Internal Revenue laws all *to the end that the deductions and credits allowable to the Express Company under the Internal Revenue laws shall be exactly equal to the income of the Express Company under the Internal Revenue laws insofar as possible.* Any balance of income of the Express Company over such allowable deductions and credits for any calendar year shall be due and payable as of such calendar year *to Rail Companies party to this form of agreement under the provisions of this Article.* (pp. 36-37)

\* \* \*

[fol. 100]

## EXHIBIT 2

# COMMONWEALTH OF VIRGINIA

BEFORE THE

## STATE CORPORATION COMMISSION

CASE No. 13233

## PETITION

OF

## RAILWAY EXPRESS AGENCY, INCORPORATED

(for Correction of Assessment of  
a Franchise Tax for the Year 1956,  
and for a Refund of Such Franchise  
Tax)

## STIPULATION

It is hereby stipulated by the undersigned as follows:

*First:* Railway Express Agency, Incorporated, was organized under the laws of the State of Delaware in December 1928. It conducts an express business in inter-

state commerce and intrastate commerce in each of the [fol. 101] states of the United States with the exception of Virginia, in which it conducts only an interstate business.

*Second:* Railway Express Agency, Incorporated, of Virginia was organized under the laws of the State of Virginia on the 30th day of October, 1931. It conducts solely an intrastate business in the State of Virginia.

**RAILWAY EXPRESS AGENCY,  
INCORPORATED**

*By (s) THOMAS B. GAY*  
*Its Attorney*

**COMMONWEALTH OF  
VIRGINIA**

*By (s) C. F. HICKS*  
*Assistant Attorney General*

**STATE CORPORATION  
COMMISSION**

*By (s) NORMAN S. ELLIOTT*  
*Its Attorney*

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[fol. 102]

**REJECTED EXHIBIT NO. 3****RAILWAY EXPRESS AGENCY, INCORPORATED****Taxes and Assessments — State of Virginia**

YEAR	GROSS RECEIPTS REPORTED	STATE LICENSE TAX PAID ON GROSS RECEIPTS	MONEY ON DEPOSIT	TAXES PAID ON MONEY ON DEPOSIT	REPORTED VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY	ASSESSMENT ON REAL AND TANGIBLE PERSONAL PROPERTY	TAXES PAID ON REAL AND TANGIBLE PERSONAL PROPERTY
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
1931	\$ 3,811,395.55 †(2,432,616.75)	\$ 40,138.18	\$127,900.00	\$255.80	\$142,708.52	\$137,144.00	\$3,497.88
1932	* 3,811,395.55 †(2,157,223.70)	35,594.19	20,460.80	40.92	136,634.41	130,739.00	3,244.03
1933	1,034,175.00	18,033.21	11,141.00	22.82	82,107.61	86,048.00	2,128.02
1934	1,010,013.00	16,665.21	12,965.00	25.93	79,984.44	84,601.00	2,091.08
1935	1,010,877.00	16,679.47	12,880.00	25.76	68,229.89	77,946.00	1,945.68
1936	1,091,721.00	18,013.40	7,805.00	15.61	56,905.21	80,986.00	1,971.13
1937	1,143,198.00	18,862.77	12,585.00	25.17	79,472.90	63,274.00	1,470.52
1938	1,140,692.00	18,821.42	12,795.00	25.79	87,265.03	66,581.00	1,786.49
1939	1,270,795.66	20,968.13	26,795.00	53.59	107,113.74	82,107.00	1,914.73
1940	* 860,000.00 †(1,689,507.60)	27,876.88	30,869.00	61.74	113,102.78	84,481.00	1,944.38
1941	* 860,000.00 †(1,737,707.40)	28,672.17	40,082.48	80.16	120,131.98	87,461.00	2,065.77
1942	900,000.00 †(1,914,730.86)	31,593.06	35,944.29	71.89	132,058.95	93,498.00	2,831.92
1943	2,538,933.12	41,892.40	28,438.48	56.88	169,143.15	117,647.00	2,873.74
1944	3,414,865.06	56,345.27	61,493.37	122.99	152,012.83	111,594.00	2,708.37
1945	3,910,361.97	64,520.97	62,794.33	125.59	141,382.33	115,224.00	2,792.59
1946	4,265,031.80	70,373.02	56,878.56	113.76	130,529.10	126,167.00	3,103.26
1947	4,181,863.68	69,000.75	84,612.25	169.22	195,460.71	130,723.00	3,344.49
1948	4,270,728.28	70,467.02	79,091.51	158.18	192,458.88	127,516.00	3,312.82
1949	4,106,518.78	88,290.15	78,615.15	157.23	180,771.81	120,803.00	3,150.99
1950	3,286,775.70	70,665.68	66,445.71	132.89	175,810.54	119,979.00	3,257.69
		(Refund) 70,665.68					
1951	3,090,916.55	66,454.71	109,906.38	219.81	193,775.70	129,279.00	3,389.65
		(Refund) 66,454.71					
1952	* 3,134,869.38 † 4,635,385.00	99,660.78	107,029.22	214.06	181,317.12	125,669.00	3,200.28
		(Refund) 99,660.78					
1953	* 3,878,805.23 † 6,738,240.00	144,872.16	86,009.58	172.02	158,706.87	117,563.00	3,025.99
		(Refund) 144,872.16					
1954	(None)	—	86,003.06	172.01	144,009.65	113,451.00	2,977.54
1955	(None)	—	105,526.01	211.05	122,784.80	105,571.00	2,680.79
1956	(None) † 6,499,519.00	—	—	—	—	—	—
		† 139,739.66	* 120,110.70	—	338,454.46	48,538.00	—

\* Amount reported.  
† Amount Assessed.

‡ Paid under protest.  
§ No assessment made.  
|| Taxes not yet paid.



## REJECTED EXHIBIT NO. 4 REJECTED EXHIBIT NO. 4

RAILWAY EXPRESS AGENCY, INCORPORATED EXPRESS AGENCY, INCORPORATED  
Taxes and Assessments — State of Virginia and Assessments — State of Virginia

REPORTED VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY							ASSESSMENT ON REAL AND TANGIBLE					ASSESSMENT ON REAL AND TANGIBLE PERSONAL PROPERTY					TAXES PAID ON REAL AND TANGIBLE PERSONAL PROPERTY					
YEAR	LAND AND BUILDINGS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OTHER TANGIBLE PERSONAL PROPERTY	TOTAL	LAND AND BUILDINGS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OTHER TANGIBLE PERSONAL PROPERTY	TOTAL	LAND AND BUILDINGS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OTHER TANGIBLE PERSONAL PROPERTY	TOTAL	
1931	\$20,433.27	\$22,009.67	\$ 77,841.09	\$ 8,437.37	\$13,987.12	\$142,708.52	\$24,638.00	\$16,787.00	\$68,850.00	\$14,979.00	\$16,787.00	\$68,850.00	\$14,979.00	\$11,890.00	\$137,144.00	\$594.78	\$419.09	\$1,770.39	\$390.06	\$323.56	\$3,497.88	
1932	19,486.59	19,964.96	77,367.33	7,731.93	12,083.60	136,634.41	24,638.00	16,647.00	62,960.00	14,847.00	16,647.00	62,960.00	14,847.00	11,647.00	130,739.00	569.22	413.36	1,590.86	360.70	309.89	3,244.03	
1933	25,542.00	15,056.55	24,090.00	6,860.33	10,558.73	82,107.61	16,250.00	13,237.00	37,000.00	7,891.00	13,237.00	37,000.00	7,891.00	11,670.00	86,048.00	406.55	302.85	919.90	184.64	314.08	2,128.02	
1934	25,417.00	14,722.89	17,920.00	5,848.04	9,076.51	72,984.44	16,250.00	15,121.00	34,000.00	7,569.00	15,121.00	34,000.00	7,569.00	11,661.00	84,601.00	384.48	354.08	863.75	179.53	309.24	2,091.08	
1935	24,917.00	12,638.50	17,290.00	5,441.76	7,942.63	68,229.89	16,250.00	15,085.00	27,320.00	7,578.00	15,085.00	27,320.00	7,578.00	11,713.00	77,946.00	388.50	347.99	696.59	182.91	329.69	1,945.68	
1936	16,250.00	11,659.71	16,920.00	5,095.39	6,980.11	56,905.21	16,250.00	15,467.00	29,532.00	7,720.00	15,467.00	29,532.00	7,720.00	12,017.00	80,986.00	379.03	358.21	748.18	183.41	302.30	1,971.13	
1937	16,200.00	11,793.95	42,296.95	5,010.90	4,171.10	79,472.90	16,200.00	15,611.00	18,647.00	7,609.00	15,611.00	18,647.00	7,609.00	5,207.00	63,274.00	273.35	324.65	576.19	176.13	120.20	1,470.52	
1938	16,200.00	11,711.31	49,872.78	5,514.45	3,966.49	87,265.03	16,200.00	16,643.00	21,217.00	6,715.00	16,643.00	21,217.00	6,715.00	5,806.00	66,581.00	387.81	386.66	711.30	162.33	138.39	1,786.49	
1939	19,100.00	15,180.35	63,144.76	5,344.58	4,344.05	107,113.74	21,100.00	19,434.00	26,948.00	7,923.00	19,434.00	26,948.00	7,923.00	6,702.00	82,107.00	479.09	374.27	717.13	184.95	159.29	1,914.73	
1940	19,450.00	14,998.37	69,456.12	4,797.23	4,401.06	113,102.78	21,450.00	18,339.00	29,886.00	7,898.00	18,339.00	29,886.00	7,898.00	6,908.00	84,481.00	359.28	464.67	760.20	184.60	175.63	1,944.38	
1941	19,450.00	15,209.69	76,229.00	5,168.45	4,074.84	120,131.98	21,450.00	19,363.00	31,862.00	7,912.00	19,363.00	31,862.00	7,912.00	6,874.00	87,461.00	490.37	443.51	787.93	185.39	158.57	2,065.77	
1942	21,250.00	17,052.68	81,722.00	7,164.53	4,869.74	132,058.95	21,450.00	19,669.00	35,481.00	7,988.00	19,669.00	35,481.00	7,988.00	8,910.00	93,498.00	681.66	562.41	1,124.11	203.17	260.57	2,831.92	
1943	42,250.00	18,040.46	98,053.03	7,254.56	3,545.10	169,143.15	32,250.00	21,601.00	48,562.00	8,258.00	21,601.00	48,562.00	8,258.00	6,976.00	117,647.00	418.01	514.78	1,577.92	196.85	166.18	2,873.74	
1944	30,366.00	18,959.73	92,031.00	7,248.93	3,407.17	152,012.83	28,950.00	22,770.00	44,055.00	8,535.00	22,770.00	44,055.00	8,535.00	7,284.00	111,594.00	725.45	539.90	1,061.90	205.10	176.02	2,708.37	
1945	30,366.00	19,336.48	81,390.00	6,851.50	3,438.25	141,382.23	28,950.00	23,158.00	45,992.00	8,520.00	23,158.00	45,992.00	8,520.00	7,604.00	114,224.00	716.53	533.84	1,168.70	196.02	177.50	2,792.59	
1946	33,366.00	20,732.38	65,351.00	6,611.39	4,468.33	130,529.10	31,450.00	24,274.00	52,460.00	8,288.00	24,274.00	52,460.00	8,288.00	9,695.00	126,167.00	792.24	574.54	1,296.48	202.34	237.66	3,103.26	
1947	32,780.00	41,647.55	94,633.00	26,400.16	—	195,460.71	32,780.00	16,669.00	71,158.00	10,116.00	16,669.00	71,158.00	10,116.00	—	130,723.00	866.66	408.41	1,810.07	259.35	—	3,344.49	
1948	32,780.00	43,142.34	89,214.00	27,322.54	—	192,458.88	32,780.00	17,138.00	67,532.00	10,066.00	17,138.00	67,532.00	10,066.00	—	127,516.00	878.24	428.64	1,742.18	263.76	—	3,312.82	
1949	32,780.00	43,640.19	77,497.00	26,854.62	—	180,771.81	32,780.00	17,333.00	60,528.00	10,162.00	17,333.00	60,528.00	10,162.00	—	120,803.00	881.11	434.50	1,557.69	277.69	—	3,150.99	
1950	32,780.00	44,035.25	72,133.00	26,862.29	—	175,810.54	32,780.00	18,247.00	58,680.00	10,272.00	18,247.00	58,680.00	10,272.00	—	119,979.00	900.00	478.59	1,596.48	282.62	—	3,257.69	
1951	32,780.00	47,050.59	87,435.00	26,510.11	—	193,775.70	32,780.00	18,646.00	67,749.00	10,104.00	18,646.00	67,749.00	10,104.00	—	129,279.00	883.54	483.61	1,717.22	305.28	—	3,389.65	
1952	32,780.00	44,427.48	78,623.00	25,486.64	—	181,317.12	32,780.00	17,540.00	65,631.00	9,718.00	17,540.00	65,631.00	9,718.00	—	125,669.00	861.78	453.11	1,605.34	280.05	—	3,200.28	
1953	32,780.00	45,658.23	56,082.00	24,186.64	—	158,706.87	32,780.00	18,120.00	57,345.00	9,318.00	18,120.00	57,345.00	9,318.00	—	117,563.00	832.78	527.39	1,390.18	275.64	—	3,025.99	
1954	32,780.00	47,003.29	40,269.00	23,957.36	—	144,009.65	32,780.00	18,740.00	52,691.00	9,240.00	18,740.00	52,691.00	9,240.00	—	113,451.00	838.36	495.39	1,369.77	274.02	—	2,977.54	
1955	28,380.00	46,986.35	24,100.13	23,318.32	—	122,784.80	33,080.00	18,722.00	44,679.00	9,090.00	18,722.00	44,679.00	9,090.00	—	105,571.00	786.05	428.36	1,206.41	259.97	—	2,680.79	
1956	32,850.00	42,884.83	239,465.24	23,254.39	—	338,454.46	32,850.00	15,688.00	(None)	(None)	15,688.00	(None)	(None)	—	48,538.00	—	—	—	—	—	—	



# ✓ REJECTED EXHIBIT NO. 5

## RAILWAY EXPRESS AGENCY, INCORPORATED OF DELAWARE

Automotive Equipment Shown in Annual Report of Railway Express Agency, Incorporated to the State Corporation Commission of Virginia for the Year 1956

<u>CITY</u>	<u>NO. UNITS</u>	<u>COST</u>	<u>MARKET VALUE</u>
Alexandria .....	8	\$ 20,150.37	\$ 11,876.52
Bristol .....	7	22,828.32	16,515.00
Charlottesville .....	6	11,193.30	405.00
Clifton Forge .....	1	1,689.78	60.00
Covington .....	2	2,961.06	120.00
Danville .....	5	7,552.97	300.00
Emporia .....	1	1,786.54	60.00
Farmville .....	1	2,020.79	505.19
Franklin .....	2	3,172.81	378.48
Fredericksburg .....	3	5,008.28	160.00
Harrisonburg .....	2	3,830.45	135.00
Lexington .....	1	1,792.21	60.00
Lynchburg .....	16	27,473.24	6,882.39
Newport News .....	11	29,857.67	22,602.32
Norfolk .....	59	166,627.63	88,960.16
Orange .....	1	1,743.37	
Petersburg .....	6	9,829.00	1,150.65
Pulaski .....	1	3,171.56	1,057.08
Richmond .....	55	137,205.12	78,476.02
Roanoke .....	14	28,852.98	8,291.49
South Boston .....	1	1,648.21	60.00
Staunton .....	3	5,131.84	195.00
Suffolk .....	2	3,085.86	120.00
Virginia Beach .....	2	3,670.80	574.94
Waynesboro .....	3	4,599.75	180.00
Winchester .....	2	3,416.52	120.00
	<u>215</u>	<u>\$510,300.43</u>	<u>\$239,465.24</u>

[fol. 105]

# REJECTED EXHIBIT NO. 6

## RAILWAY EXPRESS AGENCY, INCORPORATED OF VIRGINIA

### Taxes and Assessments

YEAR	GROSS RECEIPTS REPORTED	STATE LICENSE TAX PAID ON GROSS RECEIPTS	MONEY ON DEPOSIT	TAXES PAID ON MONEY ON DEPOSIT	REAL ESTATE		
					REPORTED VALUE	ASSESSMENT	AMOUNT OF TAXES PAID
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
1933	\$ 224,944.50	\$ 3,712.41	\$ 5,000.00	\$10.00	\$ —	\$ —	\$ —
1934	270,400.86	4,461.61	5,000.00	10.00	—	—	—
1935	333,055.97	5,495.42	5,000.00	10.00	—	—	—
1936	353,859.69	5,838.68	5,000.00	10.00	—	—	—
1937	419,128.97	6,915.63	5,000.00	10.00	—	—	—
1938	420,969.53	6,946.00	5,000.00	10.00	—	—	—
1939	455,464.82	7,515.17	5,000.00	10.00	—	—	—
1940	534,390.39	8,817.44	5,000.00	10.00	—	—	—
1941	571,645.26	9,432.15	5,000.00	10.00	—	—	—
1942	657,396.71	10,847.05	5,000.00	10.00	—	—	—
1943	827,080.19	13,646.82	23,871.75	47.56	—	—	—
1944	945,619.00	15,602.71	2,986.16	5.97	20,700.00	24,500.00	586.90
1945	1,012,600.63	16,707.91	1,838.18	3.68	20,700.00	24,500.00	586.90
1946	1,047,838.92	17,289.34	2,665.90	5.33	20,700.00	24,500.00	586.90
1947	1,163,375.81	19,195.70	2,671.00	5.34	20,700.00	24,500.00	586.90
1948	1,236,392.60	20,400.48	2,853.56	5.71	20,700.00	24,500.00	586.90
1949	987,161.57	21,223.97	3,275.79	6.55	20,700.00	24,500.00	630.90
1950	949,298.77	16,109.92	3,944.48	7.89	20,700.00	26,500.00	583.00
1951	622,211.90	13,377.56	2,709.83	5.42	20,700.00	26,500.00	583.00
1952	* 600,982.85						
	† 616,277.40	13,249.96	2,198.13	4.40	20,700.00	26,500.00	583.00
1953	706,564.62	15,191.14	1,896.30	3.79	20,700.00	26,500.00	583.00
1954	669,830.64	14,401.36	2,290.16	4.58	20,700.00	26,500.00	583.00
1955	642,841.97	13,821.10	2,711.16	5.42	20,700.00	30,080.00	571.52
1956	612,715.55	13,173.38	3,137.63	‡ —	20,700.00	30,080.00	565.50

\* Amount reported.

† Amount assessed.

‡ No taxes assessed for money on deposit.



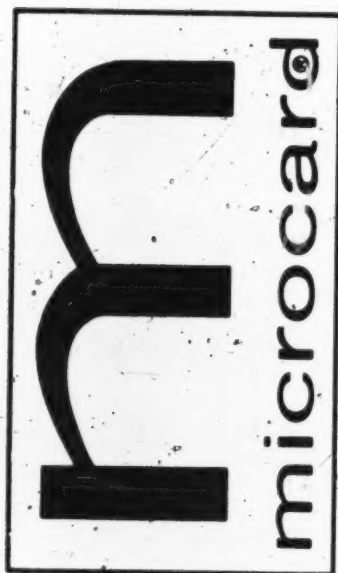


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✓ **EXCERPTS FROM EXHIBIT 9-A****ANNUAL REPORT****OF****RAILWAY EXPRESS AGENCY,  
INCORPORATED****TO THE****STATE CORPORATION COMMISSION****OF THE****STATE OF VIRGINIA****FOR THE****YEAR ENDED DECEMBER 31, 1955**

Pages 10-A, 11, 11-B and 13-B of this Exhibit show  
in part the following:

**RAILROAD MILEAGE**

<u>LINE</u>	<u>SYSTEM</u>	<u>VIRGINIA</u>	<u>PER CENT*</u>
Atlantic Coast Line .....	4,808.14	106.15	2.21
Chesapeake & Ohio .....	2,717.08	633.20	23.30
Norfolk & Western .....	1,779.54	1,072.78	60.28
Richmond, Fredericksburg & Potomac .....	113.10	109.67	96.97
Seaboard Air Line .....	3,732.67	158.80	4.25
Southern Railway .....	4,892.15	432.71	8.85

**AIRCRAFT MILEAGE**

<u>LINE</u>	<u>SYSTEM</u>	<u>VIRGINIA</u>	<u>PER CENT*</u>
American .....	8,199.	478.	5.83
Capital .....	5,261.	308.	5.85
Eastern .....	8,216.	481.	5.85
National .....	1,358.		
Piedmont .....	2,366.	530.	22.40

\* These percentages are computed and correspond to the percentages shown on the formula used by the Commission in computing the franchise tax of \$139,739.66 appearing as a schedule with Exhibit 10.



[fol. 107]

# MILEAGE COVERED — Continued MILEAGE BY STATES AND TERRITORIES

STATE OR TERRITORY (a)	STEAM-ROAD MILEAGE (b)	ELECTRIC-LINE MILEAGE (c)	COASTWISE STEAMBOAT- LINE MILEAGE (d)	INLAND STEAM- BOAT-LINE MILEAGE (e)	MOTOR CARRIER LINES (f)	MISCELLANEOUS MILEAGE (g)	TOTAL MILEAGE (h)
Alabama .....	3,587.80				132.60	2,077.58	5,797.98
Alaska .....	504.30		4,835.00			1,700.00	7,039.30
Arizona .....	2,057.80				322.25	2,593.30	4,973.35
Arkansas .....	2,965.77				1,808.60	1,714.00	6,488.37
California .....	4,858.58	34.90			3,656.60	6,478.21	15,028.29
Colorado .....	3,665.44				233.90	1,855.00	5,754.34
Connecticut .....	710.06					812.00	1,522.06
Delaware .....	314.20					290.00	604.20
Dist. of Columbia .....	18.78					85.00	103.78
Florida .....	4,186.18				295.70	2,825.00	7,306.88
Georgia .....	5,348.43				207.90	2,889.00	8,445.33
Hawaii .....	—		557.00		23.70		580.70
Idaho .....	2,042.91				33.49	920.00	2,996.40
Illinois .....	8,305.76	257.63			500.50	3,143.00	12,206.89
Indiana .....	5,565.88				1,481.50	3,187.50	10,234.88
Iowa .....	8,685.11	104.60			45.00	1,521.00	10,355.71
Kansas .....	7,737.28				953.24	1,717.00	10,407.52
Kentucky .....	2,770.77				62.10	1,576.50	4,409.37
Louisiana .....	2,738.20				2,107.00	1,830.00	6,675.20
Maine .....	1,382.92				246.80	717.07	2,346.79
Maryland .....	1,050.40			98.30	155.90	962.00	2,266.60
Massachusetts .....	1,167.61		58.80		11.40	1,040.45	2,278.26
Michigan .....	4,143.54			8.00	119.60	2,083.00	6,354.14
Minnesota .....	7,399.93				78.50	2,022.00	9,500.43
Mississippi .....	2,133.37				188.00	1,810.50	4,131.87
Missouri .....	6,118.13	2.67			728.70	2,448.57	9,298.07
Montana .....	4,739.63				52.80	1,996.00	6,788.43
Nebraska .....	5,548.55					879.00	6,427.55
Nevada .....	1,334.21				397.70	1,042.00	2,773.91
New Hampshire .....	839.94				20.00	181.00	1,040.94
New Jersey .....	1,079.81					1,306.89	2,386.70
New Mexico .....	2,309.55				256.50	2,412.00	4,978.05
New York .....	5,679.47				178.90	4,036.59	9,894.96
North Carolina .....	3,128.98				380.20	2,592.23	6,101.41
North Dakota .....	5,146.57					1,275.00	6,421.57
Ohio .....	5,868.51				46.50	3,618.00	9,533.01
Oklahoma .....	4,945.19				39.50	2,852.00	7,836.69
Oregon .....	1,783.29	4.73			1,254.14	1,799.10	4,841.26
Pennsylvania .....	4,348.06				312.10	5,851.00	10,511.16
Rhode Island .....	61.35			14.90	2.60	169.00	247.85
South Carolina .....	2,892.96				129.00	1,621.60	4,643.56
South Dakota .....	3,583.66				86.00	1,239.00	4,908.66
Tennessee .....	2,680.64				71.20	1,879.00	4,630.84
Texas .....	9,823.59				3,981.80	11,240.00	25,045.39
Utah .....	1,457.25	36.00			62.00	1,340.00	2,895.25
Vermont .....	654.59					232.00	886.59
Virginia .....	3,215.30			87.00	491.60	2,325.00	6,118.90
Washington .....	3,214.69	37.83	225.00	167.00	557.51	2,375.00	6,577.03
West Virginia .....	2,073.19				46.70	1,630.00	3,749.89
Wisconsin .....	5,894.91				603.10	1,885.00	8,383.01
Wyoming .....	1,875.68				29.00	1,990.00	3,894.68
Total U. S. ...	173,638.72	478.36	5,675.80	375.20	22,391.83	106,064.09	308,624.00



[fol. 108]

## COST OF REAL PROPERTY AND EQUIPMENT

ACCOUNT (a)	EXPENDITURES FOR REAL PROPERTY AND EQUIPMENT DURING THE YEAR			TOTAL COST TO CLOSE OF PRE- CEDING YEAR (e)	TOTAL COST TO CLOSE OF YEAR (f)
	FROM SPECIAL APPROPRIATIONS AND THROUGH ISSUE OF SECURITIES (b)	FROM CASH OR OTHER WORKING ASSETS (c)	CREDITS FOR PROPERTY RETIRED (d)		
	\$	\$	\$	\$	\$
I. Land:					
(201) Land .....	—	9,610	62,309	5,036,490	4,983,791
II. Buildings:					
(202) Buildings and appurtenances on land owned .....	—	423,404	100,040	6,524,310	6,847,674
(203) Buildings and appurtenances on land not owned .....	—	952,677	23,315	5,405,710	6,335,072
(204) Improvements to buildings not owned .....	—	120,654	7,765	183,141	296,030
Total buildings .....	—	1,496,735	131,120	12,113,161	13,478,776
III. Equipment:					
(205) Cars .....	9,981,121†	—	131,145	8,026,785	17,876,761
(206) Horses .....	—	—	—	—	—
(207) Automobiles .....	9,617,694†	153,558	3,800,160	26,595,606	32,566,698
(208) Wagons and sleighs .....	—	—	—	—	—
(209) Harness equipment .....	—	—	—	—	—
(210) Office furniture and equipment .....	—	327,362	77,316	4,423,504	4,673,550
(211) Office safes .....	—	47	9,802	377,884	368,129
(212) Trucks .....	—	11,516	55,345	3,340,304	3,296,475
(213) Stable equipment .....	—	—	—	—	—
(214) Garage equipment .....	—	21,565	94,538	420,858	347,885
(215) Line equipment .....	—	47*	6,913	101,130	94,170
(216) Shop equipment .....	—	5,257	25,233	397,554	377,578
(217) Miscellaneous equipment .....	—	30,375	—	19,836	50,211
(218) Minor equipment .....	—	—	—	2,585,763	2,585,763
Total equipment .....	19,598,815	549,633	4,200,452	46,289,224	62,237,220
Total real property and equipment .....	19,598,815	2,055,978	4,393,881	63,438,875	80,699,787

\* Denotes Credit.

† Equipment Obligations—Refrigerator Cars purchased under Conditional Sales Agreement.

‡ Equipment Obligations—Automotive Equipment purchased under Conditional Sales Agreement.



## ANNUAL REPORT — 1955

## DEPRECIATION RESERVE — BUILDINGS AND EQUIPMENT

Give particulars of the credits and debits made to account No. 548, "Accrued depreciation—Buildings and equipment" during the year. If any entries are made in columns (d), (e), and (f), state the facts occasioning such entries. The totals in columns (b) and

(k), line 21, should agree with the amounts shown in the General Balance Sheet for account No. 548, or an appropriate explanation of the difference should be made.

CREDITS TO RESERVE DURING THE YEAR					
ACCOUNT (a)	BALANCE AT BEGINNING OF YEAR (b)	CHARGES TO OPERATING EXPENSES			TOTAL CREDITS (f)
		CURRENT ACCRUALS (c)	PRIOR YEAR ADJUSTMENTS (d)	OTHER CREDITS (e)	
	\$	\$	\$	\$	\$
II. Buildings:					
(202) Buildings and appurtenances on land owned ....	3,383,352	141,840	—	—	141,840
(203) Buildings and appurtenances on land not owned	2,921,760	131,296	—	—	131,296
(204) Improvements to buildings not owned .....	19,381	57,550	—	—	57,550
Total buildings .....	6,324,493	330,686	—	—	330,686
III. Equipment:					
(205) Cars .....	2,027,798	585,163	—	—	585,163
(206) Horses .....	—	—	—	—	—
(207) Automobiles .....	20,666,719	2,112,615	—	—	2,112,615
(208) Wagons and sleighs .....	—	—	—	—	—
(209) Harness equipment .....	—	—	—	—	—
(210) Office furniture and equipment .....	1,377,335	215,086	—	—	215,086
(211) Office safes .....	320,384	2,384	—	—	2,384
(212) Trucks .....	2,255,272	59,779	—	—	59,779
(213) Stable equipment .....	—	—	—	—	—
(214) Garage equipment .....	316,603	15,352	—	—	15,352
(215) Line equipment .....	93,338	538	—	—	538
(216) Shop equipment .....	182,454	16,305	—	—	16,305
(217) Miscellaneous equipment .....	13,865	4,408	—	—	4,408
(218) Minor equipment .....	1,831,337	—	—	—	—
Total equipment .....	29,085,105	3,011,630	—	—	3,011,630
Total real property and equipment .....	35,409,598	3,342,316	—	—	3,342,316

[fol. 110]

**ACCOUNT**  
**(g)****II. Buildings:**

- (202) Buildings and appurtenances on land owned .....  
(203) Buildings and appurtenances on land not owned .....  
(204) Improvements to buildings not owned .....

**Total buildings** .....

**III. Equipment:**

- (205) Cars .....  
(206) Horses .....  
(207) Automobiles .....  
(208) Wagons and sleighs .....  
(209) Harness and equipment .....  
(210) Office furniture and equipment .....  
(211) Office safes .....  
(212) Trucks .....  
(213) Stable equipment .....  
(214) Garage equipment .....  
(215) Line equipment .....  
(216) Shop equipment .....  
(217) Miscellaneous equipment .....  
(218) Minor equipment .....

**Total equipment** .....

**Total real property and equipment** .....



DEBITS TO RESERVE DURING THE YEAR

CHARGES FOR RETIREMENTS (h)	OTHER DEBITS (i)	TOTAL DEBITS (j)	BALANCE AT CLOSE OF YEAR (k)
\$	\$	\$	\$
80,820	—	80,820	3,444,372
15,976	—	15,976	3,037,080
7,765	—	7,765	69,166
<u>104,561</u>	<u>—</u>	<u>104,561</u>	<u>6,550,618</u>
131,146	—	131,146	2,481,815
—	—	—	—
3,800,160	—	3,800,160	18,979,174
—	—	—	—
—	—	—	—
77,314	—	77,314	1,515,107
9,802	—	9,802	312,966
55,344	—	55,344	2,259,707
—	—	—	—
94,539	—	94,539	237,416
6,913	—	6,913	86,963
25,232	—	25,232	173,527
—	—	—	18,273
—	—	—	1,831,337
<u>4,200,450</u>	<u>—</u>	<u>4,200,450</u>	<u>27,896,285</u>
4,305,011	—	4,305,011	34,446,903

## COMPARATIVE GENERAL BALANCE SHEET — ASSET SIDE

BALANCE AT BEGINNING OF YEAR (a)	ITEM (b)	(b-1) TOTAL BOOK ASSETS AT CLOSE OF YEAR	(b-2) RESPONDENT'S OWN ISSUES IN- CLUDED IN (b-1)	BALANCE AT CLOSE OF YEAR (c)	NET CHANGE DURING YEAR (INCREASE IN BLACK, DECREASE IN RED) (d)
\$	INVESTMENT			\$	\$
63,438,875	(501) Real property and equipment (p. 27) .....	\$80,699,787	None	80,699,787	17,260,912
None	(502) Sinking funds (p. 45) .....	None	None	None	—
57,136	(503) Miscellaneous physical property (p. 25) .....			52,405	4,731*
	(504) Investments in affiliated companies—				
28,500	(A) Stocks (pp. 36 and 41) .....			28,500	—
None	(B) Bonds (pp. 38 and 42) .....			None	—
None	(C) Notes .....			None	—
None	(D) Advances .....			None	—
	(505) Other investments—				
None	(A) Stocks (pp. 37 and 41) .....			None	—
1,308,471	(B) Bonds (pp. 39 and 42) .....			1,242,623	65,848*
None	(C) Notes .....			None	—
None	(D) Advances .....			None	—
64,832,982	Total investment .....			82,023,315	17,190,333
	CURRENT ASSETS				
27,957,106	(506) Cash .....			34,610,796	6,653,690
1,756	(507) Special deposits .....			1,707	49*
2,457	(508) Loans and notes receivable .....			3,464	1,007
None	(509) Traffic balances receivable .....			None	—
12,606,794	(510) Net balances receivable from agents and messengers .....			14,469,867	1,863,073
2,825,205	(511) Miscellaneous accounts receivable .....			3,093,277	268,072
754,246	(512) Material and supplies .....			709,560	44,686*
2,044	(513) Interest, dividends, and rents receivable .....			1,499	545*
9,780	(514) Working fund advances .....			1,175	8,605*
906,520	(515) Other current assets .....			1,030,370	123,850
45,065,908	Total current assets .....			53,921,715	8,855,807
	DEFERRED ASSETS	(b-1) TOTAL BOOK ASSETS AT CLOSE OF YEAR	(b-2) RESPONDENT'S OWN ISSUES IN- CLUDED IN (b-1)		
76,793	(516) Insurance and other reserve funds (p. 45) .....	\$76,718	None	76,718	75*
None	(517) Provident funds (p. 45) .....	None	None	None	—
None	(518) Fidelity and indemnity funds (p. 45) .....	None	None	None	—
None	(519) Advance payments on contracts .....			None	—
17,183	(520) Other deferred assets .....			23,088	5,905
93,976	Total deferred assets .....			99,806	5,830
	UNADJUSTED DEBITS				
225,478	(521) Rents and insurance premiums paid in advance .....			278,273	52,795
427,378	(522) Taxes paid in advance .....			435,677	8,299
None	(523) Discount on capital stock .....			None	—
None	(524) Discount on funded debt .....			None	—
3,480,447	(525) Other unadjusted debits .....			1,863,073	1,617,374*
	(526) Securities issued or assumed—Unpledged (pp. 19 and 23) .....		None		
	(527) Securities issued or assumed—Pledged (pp. 19 and 23) .....		None		
4,133,303	Total unadjusted debits .....			2,577,023	1,556,280*
114,126,169	GRAND TOTAL .....			138,621,859	24,495,690

\* Denotes Decrease.



BALANCE AT BEGINNING OF YEAR (a)	ITEM (b)	(b-1) TOTAL BOOK LIABILITY AT CLOSE OF YEAR	(b-2) PORTION HELD BY OR FOR RESPONDENT AT CLOSE OF YEAR	BALANCE AT CLOSE OF YEAR (c)	NET CHANGE DURING YEAR (INCREASE IN BLACK, DECREASE IN RED) (d)
\$				\$	\$
<b>STOCK</b>					
100,000	(528) Capital stock (p. 19) .....	\$ 99,900	None	99,900	100*
None	(529) Premium on capital stock .....	None	None	None	—
100,000	Total stock liabilities .....	99,900	None	99,900	100*
<b>LONG-TERM DEBT</b>					
28,608,570	(530) Funded debt unmatured (p. 23) .....	\$28,591,266	None	28,591,266	17,304*
None	(530½) Equipment Obligations—Automotive Equipment .....	8,816,219	None	8,816,219	8,816,219
None	Equipment Obligations—Refrigerator Cars .....	9,981,121	None	9,981,121	9,981,121
28,608,570	Total Long-Term Debt .....	\$47,388,606	None	47,388,606	18,780,036
<b>CURRENT LIABILITIES</b>					
None	(531) Loans and notes payable .....			None	—
8,643	(532) Traffic balances payable .....			21,455	12,812
12,208,463	(533) Audited accounts and wages unpaid .....			13,525,582	1,317,119
7,146,375	(534) Miscellaneous accounts payable .....			6,815,544	330,831*
None	(535) Matured interest, dividends, and rents unpaid .....			None	—
None	(536) Matured funded debt unpaid .....			None	—
1,950	(537) Miscellaneous advances payable .....			1,600	350*
2,202,085	(538) Unpaid money orders, checks, and drafts .....			2,296,948	94,863
18,861,589	(539) Express privilege liabilities .....			21,396,104	2,534,515
1,885,883	(540) Estimated tax liability .....			1,787,052	98,831*
119,202	(541) Unmatured interest, dividends, and rents payable .....			95,304	23,898*
1,184,958	(542) Other current liabilities .....			2,457,307	1,272,349
43,619,148	Total current liabilities .....			48,396,896	4,777,748
<b>DEFERRED LIABILITIES</b>					
None	(543) Liability on account of provident funds .....			None	—
None	(544) Liability on account of fidelity and indemnity funds .....			None	—
None	(545) Other deferred liabilities .....			690	690
None	Total deferred liabilities .....			690	690
<b>UNADJUSTED CREDITS</b>					
None	(546) Premium on funded debt .....			None	—
6,231,024	(547) Operating and insurance reserves .....			8,171,082	1,940,058
35,405,439	(548) Accrued depreciation—Buildings and equipment (p. 27A) .....			34,442,332	963,107*
13,212	(550) Accrued depreciation—Miscellaneous physical property .....			8,043	5,169*
148,776	(551) Other unadjusted credits .....			114,310	34,466*
41,798,451	Total unadjusted credits .....			42,735,767	937,316
<b>CORPORATE SURPLUS</b>					
None	(552) Additions to property through income and surplus .....			None	—
None	(553) Reserves from income and surplus .....			None	—
None	Total appropriated surplus .....			None	—
None	(554) Profit and loss balance (p. 30) .....			None	—
None	Total corporate surplus .....			None	—
114,126,169	GRAND TOTAL .....			138,621,859	24,495,690

\* Denotes Decrease.

[fol. 113] THIS AGREEMENT entered into the 7th day of March, 1932, by and between RAILWAY EXPRESS AGENCY, INCORPORATED, a Delaware corporation, hereinafter referred to as the Delaware Company, and RAILWAY EXPRESS AGENCY, INCORPORATED, OF VIRGINIA, a Virginia corporation, hereinafter referred to as the Virginia Company:

WITNESSETH:

WHEREAS, the Delaware Company conducts an express transportation business throughout the United States and between the several States of the United States, including the Commonwealth of Virginia and other States, and

WHEREAS, the Virginia Company is about to begin the transaction of an express business within the Commonwealth of Virginia, and

WHEREAS, the Delaware Company has contracts with railroad companies and other carriers constituting and appointing it their exclusive agent for the conduct and transaction of the express transportation business over the several lines of such railroads and other carriers, including railroads and carriers operating in and through the Commonwealth of Virginia, and

WHEREAS, the Delaware Company desires that the Virginia Company transact the intrastate express business in Virginia on the lines of such railroads and other carriers with which the Delaware Company has contracts and the Virginia Company is willing to transact such business, and

WHEREAS, the Virginia Company desires to contract with the Delaware Company for the use of the Delaware [fol. 114] Company's real property and equipment in connection with the transaction of the business of the Virginia Company, and

WHEREAS, the parties hereto for purposes of mutual convenience and economy, and of more efficient service to the public, are desirous of establishing and maintaining joint forces, offices and facilities, for the transaction of the express business in Virginia.



Now, THEREFORE, it is agreed between the parties hereto as follows:

## I

The Virginia Company shall conduct the intrastate express transportation business in the Commonwealth of Virginia on the lines of the carriers named on the list hereto attached marked "Exhibit A" and hereby made a part hereof, and/or on such other lines as the Delaware Company may designate from time to time, and, except as herein otherwise provided, the Virginia Company shall perform all of the obligations of the Delaware Company imposed by contracts between the latter Company and such carriers concerning intrastate operations in Virginia.

## II

The Delaware Company shall furnish the Virginia Company from time to time, or permit the use jointly with it by the Virginia Company of, such property, real and personal, as may be necessary in the conduct of the business transacted by the Virginia Company.

## III

Whenever necessary for the conduct of the business of the parties hereto transacted in or in connection with the Commonwealth of Virginia employees of the parties hereto shall be joint employees.

[fol. 115]

## IV

All revenues received by agents of the Virginia Company shall be transmitted to the Delaware Company or such of its representatives as it may designate from time to time.

## V

The Delaware Company shall initially pay or bear all costs or expenses, including all operating expenses, taxes, (except taxes levied solely against the Virginia Company), uncollectible revenue from transportation, profit and loss

debts and similar charges. All costs or expenses incurred for the joint benefit of both parties hereto shall be apportioned between such parties on such bases as shall be agreed to by the parties. Any expenses for the exclusive benefit of either company shall be charged wholly to that company.

The revenues on intrastate business in Virginia shall accrue to the Virginia Company as shall also any other revenues which shall be earned by it or which it shall be mutually agreed shall be included in its revenue accounts. The Virginia Company shall assume all operating expenses and taxes incident to earning its revenues. Any excess of revenues over expenses, taxes, and other costs, of or chargeable to the Virginia Company as provided herein, shall be credited to the Delaware Company, in consideration of which the Delaware Company shall protect and save harmless the Virginia Company from any further payments for the transportation of the express matter of the Virginia Company over the railroad and other transportation lines in Virginia and for the use by the Virginia Company of the real property and equipment of the Delaware Company as herein provided for.

[fol. 116]

## VI

The Delaware Company shall report monthly to the Virginia Company the Virginia Company's revenues and the Virginia Company's proportion of joint expenses, also the Virginia Company's exclusive costs and charges arising from the operations under this agreement. A monthly accounting shall be made between the two companies.

## VII

This agreement shall become effective as of the 12th day of March, 1932, and shall continue in effect until cancelled by mutual consent of the parties hereto or by thirty days written notice by either party to the other of its desire to terminate the same.



IN WITNESS WHEREOF the parties hereto by their officers thereunto duly authorized have executed this agreement in duplicate as of the day and year first above written.

RAILWAY EXPRESS AGENCY, INCORPORATED

By (s) Robt. E. M. Cowie  
President

(SEAL)

Attest:

(s) E. R. Merry, Jr.  
Secretary

RAILWAY EXPRESS AGENCY, INCORPORATED,  
OF VIRGINIA

By (s) W. A. Benson  
Executive Vice President

(SEAL)

Attest:

(s) E. R. Merry, Jr.  
Secretary

[fol. 117]

## EXHIBIT A

List of Carriers Operating in the Commonwealth of  
Virginia with which the Railway Express Agency, Inc.  
has Agreements for the Transportation of  
Express shipments

March 7, 1932

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## STEAM LINES:

Atlantic Coast Line Railroad Company  
Baltimore and Ohio Railroad Company  
\*Chesapeake and Ohio Railway Company  
Chesapeake Western Railway  
Clinchfield Railroad Company  
Louisville and Nashville Railroad Company  
Nelson and Albemarle Railway Company  
Norfolk and Western Railway Company  
Norfolk Southern Railroad Company  
\*Pennsylvania Railroad Company  
Richmond, Fredericksburg and Potomac Railroad  
Company  
Seaboard Air Line Railway Company  
Virginia Central Railway  
Virginian Railway Company  
Winchester and Wardensville Railroad Company

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\*Includes Boat Lines.

## ELECTRIC LINES:

Washington and Old Dominion Railway

## BOAT LINES:

Baltimore Steam Packet Company



[fol. 118] THIS SUPPLEMENTAL AGREEMENT entered into as of the 22nd day of January 1942 by and between RAILWAY EXPRESS AGENCY, INCORPORATED, a Delaware corporation hereinafter referred to as the "Delaware Company", and RAILWAY EXPRESS AGENCY, INCORPORATED, OF VIRGINIA, a Virginia corporation hereinafter referred to as the "Virginia Company";

WITNESSETH :

WHEREAS, the parties hereto entered into an Agreement on March 7, 1932, with respect to the establishing and maintaining of joint forces, offices and facilities for the transaction of express business in Virginia, and

WHEREAS, the parties hereto now desire to supplement said Agreement of March 7, 1932, for the purpose of providing specifically for the carrying on of express business within the Commonwealth of Virginia by means of motor vehicles.

NOW THEREFORE the parties hereto further agree as follows:

A. The Virginia Company shall, in addition to the business specifically described in said Agreement of March 7, 1932, conduct an intrastate express transportation business in the Commonwealth of Virginia by means of motor vehicles upon such routes, on such schedules and subject to such rules and regulations as may be authorized or prescribed from time to time by the State Corporation Commission of Virginia, and such other regulatory body or bodies as may have jurisdiction thereof. All of the terms and provisions of said agreement of March 7, 1932, in so far as they may be applicable to said intrastate express business by motor vehicles, shall apply and pertain [fol. 119] to the conducting of said business by the Virginia Company.

B. Whenever the Virginia Company shall have been authorized by the State Corporation Commission of Virginia to conduct an intrastate express business by motor vehicles upon any particular route and/or schedule, the

Delaware Company hereby agrees that its obligations under said Agreement of March 7, 1932, in so far as said obligations relate to the conducting of express service upon said route or schedule, shall not be cancelled or terminated but shall remain in full force and effect until such time as the Virginia Company shall, in the manner permitted or prescribed by law, have discontinued or abandoned its express service upon said route or schedule.

C. The Agreement of March 7, 1932, as hereby supplemented, shall continue in full force and effect.

IN WITNESS WHEREOF the parties hereto by their officers thereunto duly authorized have executed this Agreement in duplicate as of the day and year first above written.

**RAILWAY EXPRESS AGENCY, INCORPORATED**

By (s) L. O. Head  
President

Attest:

(s) E. R. Merry, Jr.  
Secretary

(SEAL)

**RAILWAY EXPRESS AGENCY, INCORPORATED,  
OF VIRGINIA**

By (s) S. F. Pitcher  
Executive Assistant

Attest:

(s) E. R. Merry, Jr.  
Secretary

(SEAL)

[fol. 120]

EXCERPTS FROM EXHIBIT 10

ANNUAL REPORT

OF

EXPRESS COMPANIES

REPORT OF

RAILWAY EXPRESS AGENCY,  
INCORPORATED

TO THE

STATE CORPORATION COMMISSION  
VIRGINIA

FOR THE YEAR 1956

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**THE COMMISSION'S FORMULA**  
**RAILWAY EXPRESS AGENCY, INCORPORATED**

**COMPUTATION OF GROSS RECEIPTS—1955**

*Gross Receipts earned in Virginia over lines  
other than railroads*

<u>AIRLINES</u>	(A) GROSS REVENUE	(B) PERCENTAGE OF MILEAGE IN VA.	(C) VIRGINIA REVENUE COL. A X B
American .....	\$ 8,786,335	5.83	\$ 512,243
Capital .....	2,389,677	5.85	139,796
Eastern .....	4,426,667	5.85	258,960
National .....	602,628	10.78	64,963
Piedmont .....	108,400	22.40	24,281
	<hr/>		<hr/>
	\$16,313,707		\$1,000,243

*Gross Receipts earned in Virginia over railroads*

Total Gross Receipts 1955 ..... \$387,854,479

Deduct Gross Receipts on Lines operated by  
carriers other than railroads:

Payments to carriers other than RR—  
\$22,473,281

Ratio Gross Receipts on Lines other  
than railroads to payments to lines  
other than railroads—1.934 (See Note  
1)

\$22,473,281 x 1.94

43,463,325

Total Gross Receipts from operations by rail \$344,391,154

Total Amount paid to railroads for express  
privileges ..... 121,951,105

Ratio of Gross Receipts to amount paid to  
railroads ..... 2.824



RAILROADS	(A) PAYMENTS TO RAILROADS	(B) PERCENTAGE OF MILEAGE IN VIRGINIA	(C) COLUMN A X B	(D) VIRGINIA REVENUE COL. C X 2.824
A. C. L. ....	\$ 3,180,565	2.22	\$ 70,609	\$ 199,400
C. & O. ....	994,705	23.30	231,766	654,507
N. & W. ....	727,195	60.29	438,426	1,238,115
R. F. & P. ....	1,073,639	96.97	1,041,108	2,940,089
S. A. L. ....	2,244,247	4.25	95,380	269,353
Sou. ....	3,246,768	8.84	287,014	810,528
	<u>\$11,467,119</u>		<u>\$2,164,303</u>	<u>\$6,111,992</u>

[fol. 122]

*Virginia portion of Gross Receipts*

Railroads .....	\$6,111,992
Airlines .....	<u>1,000,243</u>
Total .....	\$7,112,235
Less amount reported by Virginia Corporation .....	<u>612,716</u>
Gross Receipts to be taxed .....	\$6,499,519
Tax @ 2.15% .....	\$ 139,739.66

NOTE 1. For the five major air lines which do business in Virginia the amount of payments by the express company was \$8,436,605.82. The total gross revenue of these same five lines was \$16,313,707. This gives us a ratio of gross receipts to express company payments of 1.934.

Since the air lines haul the vast majority of all express that is hauled by carriers other than railroads, and since our five airlines received 37½% of all payments to carriers other than railroads, the above ratio of 1.934 should be used.

[fol. 123]

## REPORT OF

## RAILWAY EXPRESS AGENCY, INCORPORATED

AN EXPRESS COMPANY OPERATING IN THE STATE OF VIRGINIA

Charter granted under the laws of the State of Delaware

Month: December Day: 7 Year: 1928

Location of principal office or place of business: Executive  
Headquarters No. 219 East 42nd Street, New York,  
N. Y.

Name, title and address of officer making this report:

\* \* \*

GROSS RECEIPTS FROM BUSINESS TRANSACTIONS  
IN VIRGINIA FOR THE YEAR ENDING  
DEC. 31st, 1955

## RECEIPTS

## AMOUNT

All Receipts from business beginning and  
ending within this State .....

\$

All Receipts earned in Virginia, on busi-  
ness passing through, into or out of  
this State .....

\$

None

Gross Receipts, Entire Line from the  
business of this Company for the  
year ending December 31st, 1955 ....\$387,241,764.18



[fol. 124]

[fol. 124]

(EXHIBIT PAGE 30)

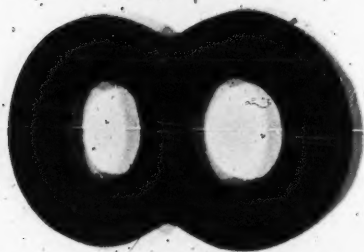
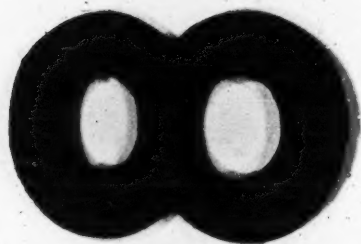
LOCATION OF PROPERTY			LAND AND BUILDINGS						LAND AND BUILDINGS						OFFICE FURNITURE AND EQUIPMENT			
			LAND			BUILDINGS			LAND			BUILDINGS						
CITY, COUNTY OR TOWN	SCHOOL DISTRICT	NAME OF EACH EXPRESS OFFICE	DESCRIPTION	NUMBER OF ACRES OR SQUARE FEET. DENOTE SQ. FT. BY "F"	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	COST	NUMBER OF ACRES OR SQUARE FEET. DENOTE SQ. FT. BY "F"	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
Cities and Towns Total								108,973.59					108,973.59	32,770.00		82,095.35	41,042.58	
County Total								360.47					360.47	80.00		3,693.52	1,842.25	
Total for State (Counties-Cities-Towns)								109,334.06					109,334.06	32,850.00		85,788.87	42,884.83	

AUTOMOTIVE EQUIPMENT					TRUCKS				ALL OTHER TANGIBLE PER		TRUCKS			ALL OTHER TANGIBLE PERSONAL PROPERTY				TOTAL VALUE REAL AND TANGIBLE PERSONAL PROPERTY		
NUMBER AND TRADE NAME	YEAR PURCHASED	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	KIND	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	DESCRIPTION	COST	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	DESCRIPTION	COST	MARKET VALUE	VALUE ASSESSED BY THE STATE CORPORATION COMMISSION	TO BE FILLED IN BY THE REPORTING COMPANY	ASSESSED BY THE STATE CORPORATION COMMISSION	
(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)	(23)	(24)	(25)	(21)	(22)	(23)	(24)	(25)	(26)	(27)	(28)	WHOLE DOLLARS	WHOLE DOLLARS
		510,300.43	239,465.24			39,957.03	19,969.46				39,957.03	19,969.46								
						6,569.83	3,284.93				6,569.83	3,284.93								
		510,300.43	239,465.24			46,526.86	23,254.39				46,526.86	23,254.39								





-58





# MICROCARD

TRADE MARK

®



[fol. 125]

**MONEY**

Money on deposit with any bank, or other corporation, or firm, or person, or in the possession, or under the control of the owner, including certificates of deposit with any bank, banking association, trust or security company in this State .....	\$118,868.96
Cash in hands of Agents .....	1,241.74
Money on deposit with any bank, or other corporation, or firm, or person, or in the possession, or under the control of the owner, including certificates of deposit with any bank, banking association, trust or security company, out of this State .....	\$ _____
Total money on deposit as of December 31, 1955	
In this state .....	\$120,110.70

[fol. 126]

**EXTRACT FROM EXHIBIT No. 13****RAILWAY EXPRESS AGENCY, INCORPORATED**

Virginia State Tax That Could Have Been Assessed on  
 Company-Owned Express Refrigerator Cars for Years 1951 to 1956, Inclusive,  
 Calculated on Formula Used by State Corporation Commission in Fixing Its Last Assessment for 1950

<u>TAX YEAR</u>	<u>VIRGINIA CAR MILES TRAVELLED PRIOR YEAR</u>		<u>VALUE ASSESS- ABLE PER 1000 CAR MILES</u>		<u>TOTAL ASSESSABLE VALUE</u>		<u>TAX RATE PER \$100 OF VALUE</u>		<u>STATE AD VALOREM TAX ASSESSABLE</u>
1951	538,535	×	\$32.8776	=	\$17,705.74	×	\$2.50	=	\$442.64
1952	404,921	×	32.8776	=	13,312.83	×	2.50	=	332.82
1953	301,352	×	32.8776	=	9,907.73	×	2.50	=	247.69
1954	260,513	×	32.8776	=	8,565.04	×	2.50	=	214.13
1955	297,667	×	32.8776	=	9,786.58	×	2.50	=	244.66
1956	520,188	×	32.8776	=	17,102.53	×	2.50	=	427.56



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Office - Supreme Court, U.S.  
**FILED**

**FEB 26 1958**

**JOHN T. FEY, Clerk**

**In the**  
**Supreme Court of the United States**

**October Term, 1957**

**No.**

**~~810~~ 38**

**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant,*

**v.**

**COMMONWEALTH OF VIRGINIA,**

*Appellee.*

**Appeal from the Supreme Court of Appeals of Virginia**

**STATEMENT AS TO JURISDICTION**

**ROBERT J. FLETCHER  
THOMAS B. GAY  
WILLIAM H. WALDROP, JR.  
H. MERRILL PASCO  
Counsel for Appellant**

**HUNTON, WILLIAMS, GAY,  
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1003 Electric Building  
Richmond, Virginia  
Of Counsel for Appellant**



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**In the  
Supreme Court of the United States**

**October Term, 1957**

                      
No. " .....  
                    

**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant,*

**v.**

**COMMONWEALTH OF VIRGINIA,**

*Appellee.*

                      
**Appeal from the Supreme Court of Appeals of Virginia**  
                    

**STATEMENT AS TO JURISDICTION**

Appellant appeals from the judgment of the Supreme Court of Appeals of Virginia entered on December 2, 1957, affirming an order of the State Corporation Commission of Virginia, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

**OPINION BELOW**

The opinion of the Supreme Court of Appeals of Virginia is reported in 199 Va. 589 and 100 S. E. 2d 785. The opinion of the State Corporation Commission of Virginia is not yet reported. A copy of the opinion of the Supreme

Court of Appeals of Virginia is attached hereto as Appendix B and a copy of the opinion of the State Corporation Commission is attached hereto as Appendix A.

## JURISDICTION

This proceeding was initiated by petition to the State Corporation Commission of Virginia under Section 58-672 of the Code of Virginia (1950) for the correction of an assessment of a *franchise* tax for the year 1956 imposed upon Appellant by it pursuant to the provisions of § 58-546 of Article 4 of Chapter 12 of Title 58 of the Code of Virginia (1950), as amended, by the 1956 Session of the Virginia General Assembly (Acts 1956, Chapter 612), and for a refund of such tax. The Virginia Commission denied the refund and dismissed the petition. The judgment of the Supreme Court of Appeals of Virginia affirming such action was entered on December 2, 1957, and the notice of appeal was filed in that Court on December 31, 1957.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U. S. Code, Section 1257(2) as the decision was rendered by the highest court of the State of Virginia and held that the Virginia statute was not repugnant to the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review by appeal the judgment in this cause: *Railway Express Agency v. Commonwealth of Virginia*, 347 U. S. 359 (1954); *Hughes v. Fetter, et al.*, 341 U. S. 609 (1951); *Western Maryland Railway Co. v. Rogan*, 340 U. S. 520 (1951); *Cities Service Gas Co. v. Peerless Oil & Gas Co., et al.*, 340 U. S. 179 (1950); and *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69 (1946).

## QUESTIONS PRESENTED

The Federal questions presented to the State Corporation Commission and the Supreme Court of Appeals of Virginia and on this appeal are:

1. Whether the tax as imposed upon Appellant for the year 1956 pursuant to Sections 58-546 and 58-547, Article 4, Chapter 12, Title 28 of the Code of Virginia (1950), as amended by the 1956 Session of the Virginia General Assembly, is not in fact an excise or privilege tax upon its right to *do solely an interstate express business in Virginia* in contravention of the Commerce Clause of the Constitution of the United States (Art. I, Section 8, par. 3).

2. Whether the amount of such tax imposed upon Appellant for the year 1956 was determined by the State Corporation Commission in such manner as to constitute a violation of Appellant's rights under the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

## STATUTE INVOLVED

The statute of the State of Virginia, whose validity is questioned, consists of §§ 58-546 and 58-547 of Article 4, Chapter 12, of Title 58 of the Code of Virginia, as amended March 31, 1956 (Virginia Acts 1956, Chapter 612), reading as follows:

§ 58-546. Franchise tax on express companies. — Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

§ 58-547. Amount of franchise tax.—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State.

The whole of Article 4, Chapter 12, Title 58 of the Code of Virginia, as amended, is printed as Appendix C hereto.

### STATEMENT OF THE CASE

Appellant is appealing from the decision of the Virginia Court on the constitutional grounds stated above. The history of the Virginia gross receipts tax on express companies as applied to Appellant is a significant aspect of this appeal and will be summarized briefly before discussing the facts in the present case material to the questions presented.

Prior to 1956 § 58-547 of the Code of Virginia, 1950, and its antecedent sections imposed an annual *license* tax on express companies *for the privilege of doing business* in Virginia in addition to the annual registration fee and property taxes provided for in the other sections of the Code. Appellant paid under protest the tax imposed upon it pursuant to § 58-547 from 1931 until 1951, when this Court in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951), held that the Connecticut tax on the privilege of doing solely an interstate business in that State violated the commerce clause of the Federal Constitution. Thereafter Appellant sought refunds for the license taxes paid pursuant to Code Section 58-547 for the years 1950 and 1951. The Virginia Commission and the Supreme Court



of Appeals of Virginia held that the tax assessed pursuant to Code Section 58-547 was a *property* tax on the intangible elements of value generated by the employment in business of the physical properties of express companies and was not a *license* or *excise* tax and therefore not violative of the Commerce Clause of the Constitution of the United States when applied to Appellant engaged solely in interstate commerce in Virginia. This Court reversed the decision of the Virginia courts in 347 U. S. 359 (1954) on the ground that the tax was in reality a license tax imposed for the privilege of doing solely an interstate business and therefore violated the Commerce Clause of the Constitution of the United States. As a result, the license taxes paid to the State by Appellant for the years 1950 through 1953, inclusive, were refunded. No license taxes were assessed against Appellant in 1954 and 1955.

At its 1956 Session the General Assembly of Virginia amended and re-enacted Article 4 of Title 58 of the Code of Virginia in the manner indicated in Appendix C which resulted in this proceeding. *The effect of the amended statute was to change the name but not the incidence of the tax.*

In its 1956 return of property to the State Corporation Commission of Virginia for tax purposes, pursuant to Section 58-548 of the Code of Virginia (1950), Appellant stated that it "has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into or out of this State'" as contemplated by Section 58-547 of the Code. The Commission, however, devised a formula for determining gross receipts derived by the Company from its interstate business in Virginia which it ascertained to be \$6,499,519, or 1.7 percentum of its total gross system revenue of \$387,241,764,

and imposed a franchise tax thereon pursuant to the provisions of Section 58-547 of the Code of Virginia (1950), as amended, in the amount of \$139,739.66. This tax was paid on September 26, 1956, under protest.

On October 18, 1956, Appellant filed with the Virginia Commission a petition under Section 58-672 of the Code of Virginia (1950) for correction of such assessment and for refund of the franchise tax of \$139,739.66 paid thereon for the reasons that the tax so imposed constituted a burden upon or regulation of interstate commerce, in contravention of Article I, Section 8, paragraph 3, of the Constitution of the United States and the taking of the Delaware company's property and a denial to it of due process of law under the Fourteenth Amendment to the Constitution of the United States.

The matter was heard by the Virginia Commission on December 17, 1956. It then appeared that Appellant was organized in 1929 by 86 (now 68) of the railroads of the United States at the suggestion of the Interstate Commerce Commission, and acquired the properties of American Railway Express Company, which had in turn been organized in 1918 at the instance of the then Director General of Railroads of the United States, so that one operating agreement might then be made by it with him as such Director General, rather than with the several independently owned and operated express companies then doing business in the United States. The Appellant immediately applied for authority, as a foreign corporation, to do an *intrastate* express business in Virginia, which was denied by the Commission on the ground that Section 163 of the Constitution prohibited any foreign corporation from carrying on, in this State, the business, or exercising any of the powers or functions of a public service corporation (S.C.C. Reports, 1929, p. 252).

This holding was affirmed in 1929 by the Supreme Court of Appeals of Virginia (153 Va. 498), and by this Court in 1931 (282 U. S. 440).

Since the foregoing decisions expressly held that "no question of the right of Appellant to do an *interstate* express business in this State" was involved but that Section 163 of the Constitution of Virginia only inhibited its conduct of an *intrastate* express business, Appellant immediately caused Railway Express Agency, Incorporated, of Virginia (here called the Virginia company), a wholly owned subsidiary, to be organized in 1931, to conduct such intrastate business. Since that time Appellant has conducted only an *interstate* express business in Virginia, and the Virginia company has done solely an *intrastate* express business in this State. Both companies have annually reported to the Virginia Commission, on forms prepared and promulgated by it, their gross receipts derived from interstate and intrastate commerce, respectively, and their property, real and personal, tangible and intangible, in Virginia, and have also paid the license or franchise and property taxes so determined by the Virginia Commission to be annually due the State of Virginia and the property taxes due the localities in which such property was located.

Prior to 1950 Appellant's express refrigerator cars had been treated by the Virginia Commission as rolling stock of a "car line" company and assessed against it *as such* under Article 5, Chapter 12, Title 58 of the Code of Virginia (1950). Because of the limited mileage travelled by such "rolling stock" in Virginia, it had no substantial taxable situs in Virginia and the taxes imposed on it were of nominal amounts.<sup>1</sup> No tax has been imposed upon Ap-

<sup>1</sup> In 1943 \$2.40, in 1944 88¢, in 1945 \$1.60, in 1946 \$1.05, in 1947 no assessment, in 1948 \$75.10, in 1949 \$489.89.

pellant's rolling stock (refrigerator cars) for the years 1950-1955 because of its contention and of the Virginia Commission's conclusion that Appellant was not a "car line" company and that its rolling stock was therefore not taxable against it *as such*.

From Appellant's 1956 return it appeared that it owned *intangible* personal property (money on deposit) of a value of \$120,110.70; tangible personal property (consisting of automotive equipment and trucks) of a value of \$239,465.24 and \$23,254.39, respectively; office furniture and equipment of a value of \$42,884.83, and real estate of a value of \$32,850.00, a total property value in Virginia on the taxable date of \$458,565.16. From the same return it also appeared that the depreciated nationwide *system* value of the *same classes* of company property was \$79,700,426.00.

The Virginia Commission made no assessment upon Appellant's money or rolling stock for the year 1956 upon the theory that the franchise tax imposed by Section 58-546 was *in lieu* of any property tax thereon. However, had such taxes been assessed upon its money on deposit and express refrigerator cars as "rolling stock", upon the basis employed in the formula applied for determining such taxes in 1950 (on 1949 values) they would have amounted to \$252.21 and \$427.56 respectively for 1956.

The "Standard Express Operations Agreement" between Appellant and the railroads, steamship lines, and airlines over the lines of which Appellant transports express matter, leaves Appellant "no net taxable income", since all of its revenue except operating expenses and fixed charges is paid over to such corporations as compensation for transporting express matter over their respective lines. The revenue thus received by the railroads operating in Virginia is sub-



ject to taxation under Section 58-519 as a part of *their* gross receipts.

By its order of March 1, 1957, the Commission held, for reasons stated in its opinion (Appendix A hereto), that the tax imposed by Section 58-546 was a *property* tax upon the good-will or going concern value of Appellant's *interstate business in Virginia* measured by the gross receipts which it determined, on a mileage basis, Appellant had earned from such business in Virginia in 1955. It, therefore, upheld the tax and denied the Appellant's application for refund of the tax. The Supreme Court of Appeals of Virginia in its opinion handed down December 2, 1957, upheld the validity of the tax upon the same ground (Appendix B hereto).

### How the Federal Questions Are Presented

The two constitutional questions were first raised before the Virginia Commission in paragraph 6 of Appellant's petition for correction of the assessment and a refund of the tax in question, where the tax was alleged to be (1) a *license* tax on the privilege of doing interstate commerce and therefore in violation of the Commerce Clause of the Constitution of the United States, but (2) if held to be a *property* tax, it deprived Appellant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution because of the amount of the tax is grossly disproportionate to Appellant's taxable property in Virginia.

The Virginia Commission in its opinion in support of its order denying the refund (Appendix A hereto) specifically held (a) that the tax was not a tax on the *privilege* of carrying on an interstate business in Virginia but an *intangible property tax* and therefore no burden on interstate com-

merce (Appendix A, App. pp. 14-20) and (b) that the amount of the tax as a *property* tax was properly determined by use of a proportion of Appellant's gross receipts and violative of no constitutional rights of Appellant (Appendix A, App. pp. 20-22).

On appeal to the Supreme Court of Appeals of Virginia, Appellant raised the two constitutional questions in the following assignments of error in its opening brief filed with that Court as required by its rules:

"3. The Commission erred in imposing a franchise tax of \$139,739.66 upon the going concern or good will value of the Delaware Company's business in Virginia, since the Company has no such intangible property in this State as to warrant the imposition of a franchise tax in that amount. The action of the Commission in this respect is therefore unconstitutional and void in that it deprives the Delaware Company of its property without due process of law and denies it the equal protection of the law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States."

"5. The Commission erred in not deciding that Section 58-546 of the Code of Virginia (1950), as amended, was unconstitutional and void since it imposed a *privilege* tax on the Delaware Company's right to do solely an interstate express business in Virginia, in contravention of the commerce clause of the Constitution of the United States."

The Supreme Court of Appeals of Virginia held that the tax was not a tax on Appellant for the privilege of doing an interstate business in Virginia but a tax on the intangible property of Appellant and that the amount of the tax was properly determined in view of the value of Appellant's exclusive nationwide express privileges said to be

reflected by Appellant's gross receipts and therefore not violative of the Commerce Clause, or other clauses of the Constitution of the United States (Appendix B, App. p. 41).

## THE QUESTIONS ARE SUBSTANTIAL

### I.

#### The Tax as Applied to Appellant Violates the Commerce Clause

The first constitutional question raised on this appeal involves a determination of whether Virginia, which had for many years imposed on Appellant, doing only an interstate business in Virginia, an annual license tax of a percentage of Appellant's apportioned gross receipts, for the privilege of doing such business in Virginia, in addition to the tax levied on its intangible personal property and rolling stock, which was held to be violative of the Commerce Clause of the Federal Constitution by this Honorable Court,<sup>2</sup> may now without violating the Commerce Clause impose the same rate of tax on Appellant's apportioned gross receipts as a franchise tax *in lieu* of the tax on Appellant's intangible property and rolling stock?

Thus it is clear that a substantial Federal question is here raised concerning the protection afforded interstate commerce by the Commerce Clause. Unless the error of the Virginia court is promptly corrected, the courts and legislatures of the several states are free to place direct burdens on interstate commerce simply by changing the names of existing privilege taxes, or giving the required name to new privilege taxes. This case sets the pattern unless reversed by this Court. A question of public importance national in scope, affecting the power of state legis-

<sup>2</sup> *Railway Express Agency v. Virginia*, 347 U. S. 359.

latures and courts over interstate commerce is thus presented.

In *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951), the Court held that a Connecticut income tax assessed against an interstate motor carrier, *doing no intra-state business in Connecticut* "for the privilege of carrying on or doing business within the State," was invalid under the Commerce Clause of the Constitution of the United States because the tax was on "the privilege of engaging in interstate commerce". In the *Spector* case, this Court was only continuing its consistent practice of enforcing the protection afforded to interstate commerce by the Commerce Clause which the Court has done on innumerable occasions down through the years.

In addition to the *Spector* case and *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 347 U. S. 359 (involving the same parties as this appeal), the following cases are further illustrative of the protection thus afforded businesses that were exclusively *interstate* in character, from state taxes upon the privilege of conducting such a business: *Memphis Steam Laundry v. Stone*, 348 U. S. 389 (1952) (flat tax per truck, which state court held to be privilege tax, held invalid when assessed against interstate laundry business); *Joseph v. Carter & Weeks Co.*, 330 U. S. 422 (1947) (privilege tax measured by gross receipts held invalid when assessed against interstate stevedoring company); *Freeman v. Hewit*, 329 U. S. 249 (1946) (gross income tax on sale of securities in interstate commerce by resident held invalid); *McLeod v. Edgworth Co.*, 322 U. S. 327 (1944) (state sales tax levied on foreign corporation doing exclusively interstate business in state held invalid); *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555 (1925) (tax assessed against interstate pipe line company, which state court held to be a privilege tax, held in-



valid when measured by percentage of capital stock and surplus); and *Alpha Portland Cement v. Massachusetts*, 268 U. S. 203 (1925) (tax assessed against foreign corporation which state court held was excise tax, held invalid when measured by percentages of "corporate excess" and net income).

Unless the Virginia Court is correct in labeling § 58-546 as a property tax its decision clearly conflicts with these decisions. Where constitutional issues are involved, this Court is not bound by the label placed upon a state statute by a state court, or a legislative body, or by the descriptive words which such a court or legislative body has applied to the statute, but decides for itself the character of the tax.

In *Railway Express Agency v. Virginia*, *supra*, this Honorable Court said in this connection:

"While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxation of gross receipts from interstate commerce, 'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect,' *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, in which inquiry 'we are concerned only with its practical operation.' *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 280. See *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443-444." (p. 363)

In *Wisconsin v. J. C. Penney Co.*, *supra*, it was stated, "But the descriptive pigeonhole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction" (p. 443). See also *Wagner v. City of Covington*, 251 U. S. 95 (1919), *Storaasli v. Min-*

nesota, 283 U. S. 57 (1931) and *McLeod v. Dilworth Co.*, *supra*.

While the Virginia Commission has decided that the tax imposed by Section 58-546 is a tax upon the intangible property of Appellant represented by the going concern value of its interstate business in Virginia, and is levied in lieu of state taxes on the Company's other intangible property and rolling stock, the amount of such tax is determined under Section 58-547 which provides that it "shall be equal to two and three-twentieths per cent of the gross receipts derived from operations in this State."

The Virginia Commission did not determine the amount or value of such intangible property in lieu of which such tax upon gross receipts is imposed, and there is therefore no amount—expressed in dollars—specifically appearing in the record from which it can be determined what the Virginia Commission found to be the going concern value of Appellant's business in Virginia. Its failure to so find is explained by its own action, in imposing the tax upon "Gross receipts to be taxed" in the amount of \$6,499,519.

The tax is therefore levied in direct proportion to the extent to which the Virginia Commission has found that the privilege of carrying on the Company's interstate business is exercised in Virginia. The tax has no relation to the value (net profits) produced by the conduct of that interstate business. Since the tax must be paid regardless of whether the operations of the Company produce value by operating at a profit, or produce no value by operating at a loss, it is necessarily on the privilege of doing an interstate express business and nothing else. *New Jersey Bell Telephone Co. v. New Jersey*, 280 U. S. 338 (1930); *Ohio Tax Cases*, 232 U. S. 576 (1914); *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912); *American Barge Line Co. v. Koontz*, 68 S. W. (2d) 56 (W. Va. 1951).

If it were a tax on the *value* produced by the exercise of the privilege and therefore a property tax, the statute should have provided that it was to be levied on the *net* profits and not on the gross receipts of the Express Company. Earnings after expenses and other charges, and not gross receipts, measure the *value* of property produced from the exercise of a privilege, or the conduct of a business.

As was said by this Court on the prior appeal in *Railway Express Agency v. Virginia*, *supra*:

"... But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. *But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. Cf. United States Glue Co. v. Oak Creek, 247 U. S. 321, 328-329.*" (Italics supplied)

See also *Southern Railway Company v. Kentucky*, 274 U. S. 76 (1927).

The foregoing authorities fully support the position that the tax imposed by § 58-546 is a *privilege* tax and not a *property* tax.

The "Standard Express Operations Agreement" between Appellant and the railroads, steamship lines and airlines over the lines of which Appellant transports express matter, leaves the Company "no net taxable income", since all of its revenue except operating expenses and fixed charges is paid

over to such corporations as compensation for the "privilege" accorded the Appellant under the agreement for transporting express matter over their respective lines. The revenue thus received by the railroads is, to the extent apportioned to Virginia, subject to taxation under Section 58-519 as a part of the gross receipts of the railroad companies doing business in Virginia.

The basic error of the Virginia Commission and the Virginia Court in characterizing the present "franchise" tax as a "property" tax lies in the failure to recognize the fundamental distinction between net income and gross profits. This is the same error that this Court held the Virginia court made previously in classifying the former "license" tax a "property" tax. The same principles apply to the tax presently imposed by Section 58-546 as a *franchise* tax as this Court held applicable to the former *license* tax (347 U. S. 359). Looking through labels, *the difference is in name only, not in the practical operation of the tax.*

The gross receipts earned by the business of Appellant in Virginia would be a proper measure of the exercise of the *privilege* of doing its interstate business in Virginia *if that privilege were lawfully taxable by this State.* It measures nothing else. It is a proper measure of what the General Assembly had in mind when it formerly levied a *license* tax upon Express Companies for the *privilege of doing business in Virginia.* But because of the action of the State itself in refusing to permit Appellant to carry on in Virginia any *intrastate* commerce, that license tax was held invalid by this Court since it was found to be a tax on the privilege of engaging solely in interstate commerce. *Substance cannot be ignored and the tax validly given a new name merely to avoid its adverse economic consequence to the Commonwealth.* Characterization of the tax as a property tax by



the General Assembly in 1956 is an obvious resort to form, since a *property* tax classification was necessary to support the right of the Commonwealth to levy such a tax.

The decision of the Virginia Court has failed to recognize the limits placed by the Commerce<sup>3</sup> Clause on the power of states to tax interstate commerce and has permitted a direct burden on interstate commerce by misconstruing Section 58-547 to be a property tax. There is no question as to Appellant being engaged solely and exclusively in interstate commerce in Virginia and we believe that the question involving the Commerce Clause presented by this appeal is substantial and of considerable public importance fully justifying review by this Court.

## II.

### **If a Property Tax, It Deprives Appellant of Its Property Without Due Process of Law**

The tax of which Appellant complained when previously before this Court<sup>3</sup> had been assessed by the Virginia Commission as a *license* tax measured by a percentage of its gross receipts pursuant to a predetermined formula but no question was then raised as to the *amount* of the tax, the only issue presented to this Court being its validity under the Commerce Clause. In the instant case, however, there is also the issue of whether the amount of the tax and the manner in which it was assessed by the Virginia Commission raises a question of due process of law.

Because Appellant had no way of determining and was therefore unable to report for taxation the amount of its gross receipts earned "in business passing through, into or

<sup>3</sup> *Railway Express Agency, Incorporated v. Commonwealth*, 347 U. S. 359.

out of" Virginia, as required by § 58-547 of the Virginia Code, the Virginia Commission undertook to determine this by means of a complex formula pursuant to which there was applied to Appellant's total system gross receipts a factor equal to the proportion which the mileage in Virginia of the major railroads and airlines over which express is shipped by Appellant bears to the total mileage of such carriers. The result was so manifestly arbitrary and unreasonable as to amount to a denial of due process. Applying the factor thus determined, the Virginia Commission assigned to Virginia for tax purposes \$6,499,519 of Appellant's total gross revenue in 1956 of \$387,241,764. The Virginia portion amounted to 1.7% of total gross revenue. The unreasonableness of this apportionment becomes apparent when it is observed that of Appellant's total assets of like class as those located in Virginia of \$79,700,426, only \$475,665, or less than 0.6% was situated in this State in 1956.

Appellee contends and the Virginia Court held that the subject of this tax is the *going concern* or *use value* of Appellant's tangible assets—an added value which results from the utilization of these assets in a nationwide express business—and that gross receipts is a fair measure of such value (Appendix B, App. pp. 31-33).

But going concern or use value must be regarded as spread among the various states in the proportions in which the tangible assets are distributed. No mileage formula or other device may be used to ascribe to one state a disproportionate part of the value of an interstate system. *Fargo v. Hart*, 193 U. S. 490 (1904); *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298 (1912); *Illinois Central R. R. Co. v. Greene*, 244 U. S. 555 (1917). Yet this is precisely what the Commission has done and the Virginia court approved. It has ascribed to Virginia, where only 0.6% of Appellant's prop-

erty is located, gross receipts amounting to 1.7% of Appellant's total gross revenue and, consequently, the same proportion of the total going concern value of all the Express Company's assets. *In effect, the Commission has declared and the Virginia Court has held that Appellant's property in Virginia is proportionately almost three times more productive of revenue than all its other assets wherever located and that therefore this property has a going concern value three times greater than its similar property located anywhere else in the nation. There is clearly no basis for any such unrealistic claim.*

By means of this unfair apportionment Virginia has succeeded in taxing property of the Express Company located outside Virginia. *The illegality of an apportionment formula which has this effect is not altered or excused by the fact that Appellant was unable to supply a fairer means of apportionment.* It is for the Virginia legislature, not the Express Company, to devise some fair means of determining what proportion, if any, of the going concern value of the taxpayer's property can fairly be ascribed to its tangible property located in Virginia.

Apart from the unfair apportionment formula by which it was assessed, the amount of the tax is indicative of its illegality. Section 58-546 of the Virginia Code declares that the tax shall be *in lieu* of taxes upon all the "other intangible property" and "rolling stock" of express companies. This Court has frequently stated that such an *in lieu* tax, however determined, will be upheld only if it does not exceed the amount of the ordinary property tax in lieu of which such tax is imposed. See, *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 696 (1894); *Cudahy Packing Company v. Minnesota*, 246 U. S. 450, 453 (1917); *Pullman v. Richardson*, 261 U. S. 330, 338-339 (1922).

Under Virginia's system of segregation of property for

State and local taxation,<sup>4</sup> the only property of the Appellant in Virginia which the state (as distinguished from localities) might have taxed was \$120,110.70 of *cash on deposit* which, at the ordinary rate applied to other taxpayers, would have produced a tax of \$252.21 and Appellant's "rolling stock" which would have produced a tax of \$427.50, a total tax of \$679.71. *Plainly the franchise tax of \$139,739.66 was no "just equivalent" of this tax at ordinary rates.*

Of course this comparison allows for no enhancement of value of such property because of its use as a going concern. But money has no going concern value; it will buy only so much in goods or services whether used by a successful business or one which has no good will.<sup>5</sup> And even if all of Appellant's property in Virginia, except money, *including tangible property and real estate which the state, under its system of segregation of property for state and local taxation, is forbidden to tax*, is taken into consideration, the total value of such property (\$325,555) certainly cannot be said to have a going concern value of \$27,947,932 which would be the value necessary to produce a tax of \$139,739.66 *at the ordinary rate of tax on intangibles (.50¢ per \$100 of value).*

Because the tax imposed so grossly exceeds what would be the tax at ordinary rates on Appellant's property in Virginia even when valued as part of a going concern, it cannot be regarded as a valid *in lieu* tax, but obviously reaches Appellant's property located outside Virginia and is therefore invalid.

These considerations make it plain that there is a substantial question as to the validity of this tax under the due process clause of the Fourteenth Amendment which ought to be considered and reviewed by this Court.

<sup>4</sup>Constitution § 171, Virginia Code § 58-95.

<sup>5</sup>*Railway Express Agency v. Virginia*, *supra*, p. 365.



## CONCLUSION.

Since there is no question as to Appellant being engaged solely and exclusively in interstate commerce in Virginia, it is believed that the two questions presented by this appeal are not only substantial but of considerable public importance and fully justify a review by this Honorable Court.

Respectfully submitted,

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## **APPENDIX A**

**Opinion of State Corporation Commission of Virginia**

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

March 1, 1957

Application of  
RAILWAY EXPRESS AGENCY, INCORPORATED

Case No. 13233

For refund of 1956 Franchise Tax.

Opinion, CATTERALL, *Chairman*.

For many years Railway Express paid its Virginia franchise tax under protest, but it took no steps to resist the tax until after the Supreme Court had announced its decision in the case of *Spector Motor Service v. O'Connor*, 340 U. S. 602. Inspired by the decision in that case, it petitioned for a refund and won in the Supreme Court by a vote of 5 to 4 in *Railway Express Agency v. Virginia*, 347 U. S. 359. The result was a substantial windfall for the Express Company at the expense of the State of Virginia. The dissenting opinion pointed out (p. 371):

"As a result of the immunity given by today's decision, appellant and others similarly situated receive a windfall in the form of a valid claim for tax refunds extending back as far as limitations will permit. This is the result of today's twist to the Spector doctrine \* \* \* This approach is rather hard on the states and creates additional obstacles for them in their continuing effort to make purely interstate business units pay a fair share of the cost of state facilities and services essential to the functioning of these enterprises."

The court's decision cost the state about \$600,000 in taxes; and the General Assembly at its next session passed the statute now under attack. The new statute makes two changes in the law designed to overcome objections based on the commerce clause of the federal constitution. The new statute, instead of calling the tax a privilege tax, describes it as a property tax. The new tax, which is a tax on the going concern value of the business, is imposed in lieu of certain other property taxes.

Evidence was taken on December 17, 1956. Thereafter, briefs were filed and oral argument was presented. Thomas B. Gay and H. Merrill Pasco appeared for the taxpayer. Frederick T. Gray, by special appointment by the Attorney General, appeared for the Commonwealth; and Norman S. Elliott for the Commission.

Although the words of the Constitution to be construed in this case are few and simple, they have given rise to much controversy and misunderstanding. Those words are:

"The Congress shall have Power \* \* \* To regulate Commerce \* \* \* among the several States, \* \* \*"

At first blush, it is hard to see how those words could have any bearing on this case. The words confer power on Congress; and Congress has passed no law that could apply here. The words do not purport to limit the powers of the states; and, when we examine the Constitution as a whole, we find that when the Framers meant to restrict the rights of the states they used express language to say so. By following that practice, they manifested their understanding that conferring a power on Congress did not *ipso facto* deny it to the states. For example, the Constitution gives Congress power to coin money, to declare war and to raise armies. It gives the President power to make treaties.



The Framers thought that that alone would not operate to keep the states from coining money, declaring war, raising armies and making treaties. They considered it necessary to add:

"No state shall enter into any Treaty, \* \* \* coin Money; \* \* \*

"No State shall, without the Consent of Congress, \* \* \* keep Troops, or Ships of War in time of Peace \* \* \* or engage in War \* \* \*

Granting to Congress the power to lay and collect taxes and to borrow money did not keep the states from doing the same thing. Giving Congress the power to pass "uniform Laws on the subject of Bankruptcies" did not automatically deprive the states of power to pass bankruptcy laws. *Butler v. Goreley*, 146 U. S. 303, 36 L. ed. 981. Only the Commerce Clause has been given this peculiar interpretation. It alone diminishes the rights of the states without saying so. In all other instances state laws are valid unless they conflict with an affirmative prohibition in the Constitution or a constitutional Act of Congress.

How did this peculiar situation come about?

In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, Daniel Webster argued (p. 13):

"He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several states to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several states, respectively, but the com-

merce of the United States. Henceforth, the commerce of the states was to be an unit; and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. Its character was to be described in the flag which waved over it, *E Pluribus Unum*. Now, how could individual states assert a right of concurrent legislation, in a case of this sort without manifest encroachment and confusion. It should be repeated that the words used in the constitution; 'to regulate commerce' are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires."

And Chief Justice Marshall agreed with him (p. 209):

"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

"There is great force in this argument, and the court is not satisfied that it has been refuted."

All that counsel and the court said on that interesting subject was unnecessary to the decision, because Gibbons had a federal license duly issued under an Act of Congress with which the state statute conflicted.

*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, involved the clause of the Constitution which forbids the states in express terms to "lay any imposts or duties on imports." Chief Justice Marshall used the occasion to expand his theory of the self-executing effect of the Commerce Clause by asserting that there is no difference between interfering with a regulation made by Congress and interfering with the power of Congress to make the regulation.

At page 448, speaking of state duties on imports he says:

"It is too obvious for controversy, that they interfere equally with the power to regulate commerce."

And:

"We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

The fallacy of what the Chief Justice maintains ought to be "too obvious for controversy". A state law in conflict with a valid federal regulation is of course void. For that very reason, a state law that does *not* conflict with any federal regulation, could not possibly interfere with the power of Congress to regulate.

These dicta of the great Chief Justice are the little acorns from which have grown the impenetrable forest of decisions on the question of when the states may or may not tax or regulate interstate commerce. For the rule is not absolute. Webster, in his argument quoted above, pointed out that, in the nature of things, the rule could not be absolute. The correct statement of the rule we are considering is: "Sometimes, the states may not regulate or tax commerce among the states."

The Framers of the Constitution *did* not, and must have seen that they *could* not, impose a blanket prohibition against

state regulation of interstate commerce. At that time the only law that regulated interstate commerce was state law. To abolish that law overnight by constitutional mandate would have left the whole field without law until Congress got around to legislating on it. It is quite true, as Marshall repeatedly points out, that the main reason for junking the Articles of Confederation was to confer on the central government the power to regulate interstate and foreign commerce. The Constitutional Convention solved the problem by giving Congress the power to regulate. Where regulation was needed, Congress was to adopt regulations. Until Congress acted, state regulations were to remain in full force and effect. That plan was not good enough for Webster and Marshall, and they worked out something better.

In staking out the line dividing the field in which the states were free to regulate from the field in which they were forbidden to regulate, the court, of course, had to take each case as it came up, but felt obliged to lay down a general principle to explain what it was doing. That statement of principle, in *Cooley v. The Port Wardens*, 12 How. 299, 13 L. ed. 996, was (p. 319):

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The court has had occasion to quote that sentence many times. Sometimes, however, it varied one of the words in the quotation, and the change of that one word greatly changed the meaning of the quotation. For example, in the *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146, the court expressed the view that the rule in *Cooley* was clear, saying:



"However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

It will be observed that the word "*only*" has been dropped from the declaration of the governing principle. The difference between the two methods of stating this cardinal rule of constitutional interpretation is almost as great as the difference between night and day. The omission of the word "*only*" after the word "*admit*" makes a big change in the meaning; and the most striking thing about the change is that the court did not notice that it had made a change. It was as if the court was under the mistaken impression that the sentence: "I eat spinach," means the same thing as: "I eat *only* spinach."

The contrast between the two methods of stating what the court considered to be the same thing is brought out by observing that practically everything *admits* of one uniform system of regulation and practically nothing *admits only* of one uniform system of regulation. The most conspicuous example of a regulation that, by absolute necessity, must be uniform throughout the United States, is the rule that motor vehicles travelling in commerce must pass each other on the right. If they passed on the right in Maine, on the left in New Hampshire, on the right in Massachusetts, on the left in Rhode Island, and so on down the coast, the consequences would be too awful to contemplate. Here, if anywhere, the court could be sure that the subject is in its nature national and admits *only* of one uniform system or plan of regulation; but the court has not forbidden the states to regulate

this part of interstate commerce during the silence of Congress.

Thus it appears that this supposed rule that "has been asserted with great clearness" is not very clear and is not even a rule. There can be no disputing the court's pronouncement in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 420, that

"... the history of the commerce clause has been one of very considerable judicial oscillation."

In *Southern Pacific Company v. Arizona*, 325 U. S. 761, 89 L. ed. 1915, we find the court debating the policy question of whether it is better to endanger the lives of brakemen on freight trains or of motorists at grade crossings. The brakemen lost, and Mr. Justice Black was moved to remark (p. 788):

"... this Court to-day is acting as a 'super-legislature.'"

In *Morgan v. Virginia*, 328 U. S. 373, 90 L. ed. 1317, he said (concurring at page 386):

"The Commerce Clause of the Constitution provides that 'Congress shall have power . . . to regulate commerce . . . among the several States.' I have believed, and still believe that this provision means that Congress can regulate commerce and that the courts cannot. But in a series of cases decided in recent years this Court over my protest has held that the Commerce Clause justifies this Court in nullifying state legislation which this Court concludes imposes an 'undue burden' on interstate commerce. I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress."

The unenviable situation of an inferior court in deciding cases involving state regulation and taxation of interstate commerce is that it frequently cannot tell which way the Supreme Court will oscillate next. For, after all, it is not the last decision of the Supreme Court that governs the pending case, but the next decision; and the outcome of these commerce clause cases turns not on any rule of law but on how the facts of each particular case impress a majority of the Justices. In *Railway Express Agency v. Virginia*, 347 U. S. 359, 98 L. ed. 757, a bare majority of the court reached the conclusion that the Virginia tax on the express company was too heavy a burden on interstate commerce.

The peculiar feature of this case is that the Railway Express Agency *does no intrastate business in Virginia*. It does both kinds of business in all the other states. If it had done any intrastate business in Virginia, the decision would have gone the other way. If the case had come up from any state but Virginia, a statute in the same words as the Virginia statute would have been held constitutional. If the taxpayer had done \$10 worth of business intrastate in Virginia, it would have had to pay the tax on all its interstate business in Virginia, although the burden on interstate commerce would have been the same in both cases. When we remember that it is a constitution we are construing, and when we observe that the dividing line between what the states may and may not do is drawn by the judges on considerations of policy by balancing the national interest in free movement against the local interest in regulating local affairs, it is wonderful that so fine and technical a line could be drawn: a line that bears no relation to the supposed reason for drawing a line.

The unbelievably narrow line separating a good statute

from a bad one is illustrated by comparing the *Railway Express* case with the *Steamboat* cases. The Virginia statute imposing a gross receipts tax on steamboat companies was almost word for word the same as the Virginia statute imposing a gross receipts tax on express companies. There was no material difference in the law, and the only significant difference in the facts was that the steamboat companies did a little intrastate business. In the *Steamboat* cases the Supreme Court dismissed without opinion the appeal from the Supreme Court of Appeals of Virginia. In *Railway Express Agency v. Virginia*, 347 U. S. 359, the court explained the difference between the *Express Company* case and the *Steamboat* cases as follows (p. 368):

"The Supreme Court of Appeals placed reliance upon our dismissal of the appeals in *Baltimore Steam Packet Co. v. Virginia*, 343 US 923, 96 L ed 1335, 72 S Ct 763, and *Norfolk B. & C. Line, Inc. v. Virginia*, 343 US 923, 96 L ed 1335, 72 S Ct 764, and may well have been misled, since we assigned no reasons and cited no authority. In those cases, the Virginia court held an almost identical tax to be a property tax. *Commonwealth v. Baltimore Steam Packet Co.*, 193 Va 55, 68 SE2d 137. But a vital distinction, so far as our jurisdiction is concerned, will account for dismissal of the appeals. One of those appellants was a Virginia corporation and derived its privilege to exist from that State. Both were engaged in intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State. For our purposes, it mattered not whether the right to tax was based on those companies' privileges or on their property, since they were taxable on either basis. This fact distinguishes those dismissed cases from the one at bar and from *Spector Motor Service, Inc. v. O'Connor*, 340 US 602, 95 L ed 573, 71 S Ct 508, *supra*."



"A vital distinction," as that phrase is used by the court, means a distinction that makes the difference between constitutionality and unconstitutionality. That vital distinction, says the court, is: "One of those appellants was a Virginia corporation \* \* \* Both were engaged in intrastate as well as interstate commerce \* \* \*"

Apparently there were two vital distinctions. The Norfolk, Baltimore and Carolina Line was a Virginia corporation. If that be a vital distinction between it and Railway Express Agency, the holding of the court is that if Railway Express Agency had been a Virginia corporation it would have had to pay the tax. But the burden on interstate commerce is exactly the same whether the taxpayer is incorporated in Delaware or in Virginia.

That distinction did not exist in the case of the Baltimore Steam Packet Company. The taxpayer, like Railway Express Agency, was a foreign corporation. Consequently, the only difference between those two corporations was that Baltimore Steam Packet Company did a little intrastate business in Virginia.

In the *Baltimore Steam Packet* case the tax on gross receipts was computed on the fraction of total receipts that the miles travelled in Virginia bore to the total miles travelled. Under that allocation, the gross receipts earned in Virginia from both kinds of business was \$1,158,000. Of that amount the gross receipts from transportation intrastate between Virginia ports was \$2,287. The tax on the allocated interstate receipts was \$18,981.20. The tax on the intrastate receipts was \$34.31. So the vital distinction, the difference between good and bad, is that the Steamboat Company must pay on all earnings derived from operations within the geographical boundaries of Virginia, because, and only because, *one-fifth of one per cent* of those operations involved movement from one point to another within

those boundaries. Because it had those *gross* receipts of \$2,287 (from which the net earnings, if any, can not have been much) it was required by the Supreme Court of the United States to pay a tax of \$19,000. It so happened that the tax held constitutional was 800% of the gross income that alone served to make it constitutional. That was not a borderline case. It was such a clear case that the Supreme Court dismissed the appeal without wasting time on oral argument. There can be no constitutional difference between \$2,287.00 and \$2.28 unless the court is prepared to draw a new line and declare that what the Framers really meant when they gave Congress power to regulate commerce was that a state tax on the privilege of engaging in interstate commerce is valid if the taxpayer does intrastate business of \$2,287 but void if its gross intrastate earnings are only \$2,286.

The "vital distinction" relied on by the Supreme Court to distinguish the *Baltimore Steam Packet* case from the *Railway Express* case was that one foreign corporation had no gross earnings in Virginia intrastate business and the other had \$2,287 of such earnings. On that basis alone the two cases look pretty much alike. Actually, however, when all the facts of both cases are considered, they are even more alike. It is true that the express company does no intrastate business in Virginia; but it owns all the stock of a subsidiary Virginia corporation that does do business in Virginia; and the gross receipts of that subsidiary are more than \$2,287. The steamship company did all its business, interstate and intrastate, in the same steamboats manned by the same crews. The two express companies do all their business, interstate and intrastate, in the same trucks operated by the same drivers. The net earnings of Railway Express Agency of Virginia go into the pocket of the parent company, the Delaware corporation. Looking at the physi-

cal aspects of the express business and of the steamship business no relevant differences can be perceived by the naked eye. The only difference left, when all the facts are considered, is that the steamship company earned the fatal 2,287 intrastate dollars through servants employed by it; and the two express companies earned more than 2,287 intrastate dollars through servants employed by them jointly. The express business is one business carried on by two corporations, one of which owns the other.

The court's opinion in *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, begins with the lament:

"This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them."

The states have to collect taxes if they are to continue to exist as members of this indissoluble union of indestructible states, and, since most commerce is interstate commerce they have to make interstate commerce pay its way. The federal government, through its duly constituted legislative body, has practically absorbed the field of income taxes, and through its supreme judicial body has restricted other sources of state tax revenue. The duty of self preservation forces the states to press against the barriers erected by the Supreme Court, and so long as those barriers are endlessly shifting the problems will continue to be endless. The problems are endless because the superstructure erected by the court on Marshall's dicta is not based on logic. If the first premise of an argument is not logical nothing that follows can be entirely satisfying. The most striking example of this occurs in the court's unsuccessful efforts to explain how it happens that an Act of Congress can confer on the states powers that the Constitution forbids them to

exercise. If it were true that the Commerce Clause, by its own unaided force and effect, forbids the states to regulate insurance, Congress could no more authorize the states to regulate the insurance business (*Prudential Insurance Co. v. Benjamin*, 328 U. S. 408) than it could authorize them to pass bills of attainder. The only way out of this logical dead end is to recognize that it is not the constitution but the court that forbids the states to regulate and tax interstate commerce in fields not occupied by any Act of Congress. The key to the riddle is the first line of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."

No friend of states rights could be optimistic enough to expect the court to give up the power it has so long exercised of striking down state laws that, in its judgment, go too far in taxing interstate commerce. The most that can be seriously hoped for is that the court will decide close cases in favor of the states. The burden of the argument up to this point is that, if the Virginia tax on steamship lines was obviously valid, the old Virginia tax on express companies, which differed by less than a hair's breadth from the Virginia tax on steamship lines, was almost obviously valid. If the steamship tax was clearly valid, the express company tax could not be void beyond a reasonable doubt, and *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, ought to be overruled.

The remainder of this opinion will deal with the two changes made by the 1956 statute. The first change was to bring the state legislature in line with the state court in treating this tax as a tax on property.

The fatal defect in the Virginia statute held unconstitutional in *Railway Express Agency* was that five Justices found that the tax was on a privilege and not on property. The manner in which the five Justices dealt with the tax is



accurately described by the four Justices who dissented (347 U. S. 370):

"The Supreme Court of Appeals of Virginia has held that the instant tax is an ad valorem tax on intangible property; the 'operating incidence' of the tax has been labeled the 'going concern' value of appellant's physical assets in Virginia. The state court specifically held that the tax 'is not a tax upon the privilege of carrying on a business exclusively interstate in character . . . ' 194 Va 757, 760, 761, 75 SE2d 61. Hence, if we accept the determination of the state court, there is little question but that the tax is valid even under *Spector*.

"This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same 'privilege' label that condemned the tax in *Spector*. Although the Court refused to pierce the label in *Spector*, I do not dispute its right to re-examine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. But neither fact justifies the Court's refusal to accept the determination of the state court in this case. The name given the tax by the Virginia court meshes with the state's taxing scheme. And I do not believe that the Virginia court deliberately mislabeled the tax. Indeed, the holding of the state court is perfectly consistent with its earlier expressions on the subject and those of the State Corporation Commission, some antedating *Spector*. *Commonwealth v. Baltimore Steam Packet Co.* 193 Va 55, 68 SE2d 137 (1951), app dismd 343 US 923, 96 L ed 1335, 72 S Ct 763, 764 (1952); *Richmond v. Commonwealth*, 188 Va 600, 50 SE2d 654 (1948). Moreover, this Court does not question the existence of a going-concern value aside from the value of a business unit's physical assets."

Beginning with railroads in 1902, when its present constitution was adopted, it has been the policy of Virginia to impose gross receipts taxes instead of income taxes on public utilities. From the beginning those taxes have been looked on as property taxes no matter what they were called.

Sec. 177 of the Virginia Constitution imposes "an annual State franchise tax" on railroads measured by gross receipts "for the privilege of exercising its franchise in this State, . . ."

Sec. 178 allocates the tax on interstate railroads:

"By ascertaining the average gross transportation receipts per mile over its whole extent, within and without this State, and multiplying the result by the number of miles operated within this State; provided that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other states over similar facilities or advantages in this State."

If the tax were not a tax on property there could be no reason to adjust the tax when the value of out-of-state terminals so exceeded the value of in-state terminals as to indicate that the relationship of in-state mileage to out-of-state mileage was not a fair test of relative property values.

Sec. 170 says:

"The General Assembly . . . may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property. . . ."

If a franchise tax were not a tax on property it could not be imposed in lieu of a tax on "other" property. Although

franchise taxes were *called* taxes on a privilege, they in fact were considered to be, and were, property taxes.

This system of taxing railroads, later extended to other public utilities, was presented to the Virginia Constitutional Convention of 1902 as a tax on property. The constitution itself (Sec. 177) imposed the tax on railroads. The taxes on other companies were left to the legislature. In explaining the proposed system to the Convention, Mr. C. V. Meredith, presenting the report of the Committee on Taxation and Finance, said at page 2857 of the Debates:

"It is true that there is a difference between a tax upon a franchise and a tax upon capital. A franchise tax may embrace all the capital or it may embrace only a portion of it. The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at;"

\* \* \*

"I call your attention to the fact that it is our desire and hope that the Legislature will see fit to levy a system of franchise taxes by which the entire property of a corporation will be gotten at, and that it will levy a tax on the entire property. If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. Why? You know that a share of stock is not a debt. There is nobody from whom you can collect it. You are entitled to no interest on it. It is simply your title deed to your share in the corporation. It simply

represents the interest which you have in this property which we propose to tax under the franchise system, if the Legislature does its duty, which we suppose it will."

*Great Northern Railway Co. v. Minnesota*, 278 U. S. 503, involved a gross receipts tax on railroads. The tax on interstate receipts was imposed "in proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done."

The court said (p. 507):

"The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state."

If a tax on the gross receipts of a railroad is a property tax, it would seem to follow that a tax on the gross receipts of an express company would be a property tax. And if it is a property tax it ought to remain a property tax no matter what it is called. However, five Justices of the Supreme Court have held that the old Virginia tax on express companies was a privilege tax. The last sentence of the opinion of the four dissenting Justices is (347 U. S. 372):

"The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval."

The Virginia legislature, in passing the new law, has not only used the tax language most likely to meet the court's approval, but has made the new tax in lieu of other property taxes. Sec. 171 of the Virginia constitution provides:



"No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or re-assessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

Local taxes on the real and tangible property of railroads, express companies and other utilities are levied by the localities on the basis of assessments made by the State Corporation Commission. In making the assessments the Commission considers only the value of the physical property, its bare bones value without any going concern value, because the going concern value is intangible property subject to taxation by the state and not by the locality. Because of the known propensity of local taxing authorities, to combine low assessments with high rates, this Commission, for the protection of the utilities, assesses the physical property of state-wide utilities at 40% of its appraised value. The City of Richmond, claiming that this method of 40% assessment was unfair to it, appealed to the Supreme Court of Appeals of Virginia. *Richmond v. Commonwealth*, 188 Va. 600, explains and upholds this method of assessment.

Sec. 171 of the Constitution, quoted above, permits the state to tax "the rolling stock of public service corporations." In the case of a public service corporation like an express company its rolling stock consists mainly of motor vehicles. The property tax on the automotive equipment of motor vehicle common carriers is assessed by the Commission under §§ 58-618 to 58-626.1 of the Code of Virginia. The history and interpretation of that tax are given in *East Coast Freight Lines v. Richmond*, 194 Va. 517.

Counsel for the express company argues that § 58-9 of the Code of Virginia permits the localities to tax the express company's motor vehicles and that the 1956 franchise tax on express companies should not be construed to change that result by making the state franchise tax in lieu of that local property tax. The constitution of Virginia does not segregate the rolling stock of any public service corporation to either state or local taxation. The express language of § 58-546 makes the franchise tax on express companies "in lieu of property taxes on its rolling stock." There can be no doubt that § 58-546 supersedes the part of § 58-9 relied on by counsel. In *Fast Coast Freight Lines v. Richmond*, 194 Va. 517 at 524 the Court said:

"We concur in the opinion of the trial judge, 'that rolling stock of public service corporations is not the subject of any constitutional segregation,' and that no statutory segregation of rolling stock of a corporation of the character of the appellant has been pointed out. The only statutory segregation provided is that contained in § 58-9, Code of 1950, which segregates the rolling stock of railroads operated by steam, and § 58-624, which is, as we have pointed out, inapplicable to appellant because of § 58-626.1."

Next, counsel for the taxpayer argues that a tax on the intangible going concern value of a business cannot exceed a small fraction of the value of the physical property used in the business; and says that the tax in the present case is not a small fraction but a big one. But the going concern value of a business depends on the value of the business as a going concern and not on the value of the land, machinery, equipment and tools used in the business. In *Adams Express Company v. Ohio*, 166 U. S. 185, 41 L. ed. 965, the court said:

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man."

\* \* \*

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000 and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

In the case before us the Delaware company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in

the same vehicles with the same employees. If the parent company should transfer title to all the property used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as a separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts. In our opinion the tax is constitutional and the application for a refund is denied.

HOOKE and KING, *Commissioners*, concur.



## **APPENDIX B**

**Opinion of Supreme Court of Appeals of Virginia**



In the  
**Supreme Court of Appeals of Virginia**

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RECORD No. 4742

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RAILWAY EXPRESS AGENCY,  
INCORPORATED

v.

COMMONWEALTH OF VIRGINIA

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FROM THE STATE CORPORATION COMMISSION

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OPINION BY JUSTICE ARCHIBALD C. BUCHANAN  
Richmond, Virginia, December 2, 1957

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Present: All the Justices.

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This is an appeal from an order of the State Corporation Commission which denied the application of the appellant made under § 58-672 of the Code for correction and refund of the franchise tax assessed against it by the Commission for the year 1956, pursuant to amended Article 4, Chapter 12, Title 58, § 58-546 through § 58-555 of the Code, as amended by Acts 1956, ch. 612, p. 964. The Code sections material to this controversy appear below.<sup>1</sup> In its opinion

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<sup>1</sup>“§ 58-546. Franchise tax on express companies. — Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be

filed in support of its order, as required by § 156(f) of the Virginia Constitution, the Commission held that the tax imposed by these sections was a property tax on intangible property of the appellant, in lieu of other property taxes, and not prohibited by the United States Constitution.

In its Annual Report for 1956, required by the Commission pursuant to § 58-548, the appellant, in response to the inquiry on the form furnished it by the Commission as to

in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

"§ 58-547. Amount of franchise tax. — The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

• "§ 58-548. Annual report. — Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding."

• "§ 58-549. Assessments by Commission. — The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of the real estate and tangible personal property other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers."

"§ 58-553. No other taxes on express companies; exceptions. — The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies, except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law, or the annual registration fee."



what receipts were by it "earned in Virginia on business passing through, into or out of this State," answered "None", and attached a statement saying, in part, "This Company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into or out of this State'."

The Commission thereupon, as directed by § 58-549, proceeded to "make the assessments upon the best and most reliable information that it can procure". By a method of calculation shown in the record it determined the appellant's gross receipts from business passing through, into or out of Virginia by computing on a mileage basis the proportion which its receipts from express transported by it over six railroads (omitting ten others because *de minimis*) and five airlines operating in Virginia bore to the total receipts from express transported by the appellant over the entire lines of these carriers. The amount so ascertained as gross receipts earned in Virginia was \$6,499,519, to which the 2.15% rate fixed by § 58-547 was applied, resulting in the tax of \$139,739.66 assessed by the Commission against the appellant, of which it now complains.

The appellant, which will sometimes be referred to herein as the Delaware Company, was incorporated in Delaware in 1928, and does an express business in all of the States of the Union, interstate in all, and intrastate in all except Virginia. Because of the provision of § 163 of the Virginia Constitution it was denied a certificate to engage in intrastate express business in this State.<sup>2</sup> The Delaware Company has a contract with 68 railroads which own its entire

<sup>2</sup> *Railway Express Agency, Inc. v. Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. ed. 450.

capital stock, and 109 non-stockowning railroads which gives it the exclusive right and privilege to conduct express transportation business over their lines, including those operating in Virginia.

In 1931 the Delaware Company caused to be chartered and organized under the laws of Virginia the Railway Express Agency, Incorporated, of Virginia, for the purpose of conducting a purely intrastate express business in Virginia. The Delaware Company owns all the stock of the Virginia Company and in 1932 entered into a contract with it by which the Virginia Company agreed to conduct the intrastate business in Virginia on the lines of the railroads named by the Delaware Company, and to perform the obligations of the latter company with its contracting carriers concerning intrastate operations in Virginia. The contract provided for joint use by the two companies of real and personal property, equipment and employees.

On the hearing before the Commission it was stipulated that the Delaware Company "conducts an express business in interstate commerce and intrastate commerce in each of the states of the United States with the exception of Virginia, in which it conducts only an interstate business," and that the Virginia Company "conducts solely an intrastate business in the State of Virginia".

Under its assignments of error on this appeal the appellant contends: (1) that §170 of the Virginia Constitution does not authorize the imposition of this tax; that §58-546 does not impose it; that §58-547 provides no adequate method for determining gross receipts from interstate commerce and does not authorize the method employed by the Commission; (2) that the tax imposed is not a property tax as held by the Commission, but a tax levied upon the privilege of doing an interstate business in Virginia and hence

invalid; (3) that the Commission should not have classified appellant's automotive equipment and trucks as rolling stock; and (4) that the Commission erred in rejecting as immaterial some of appellant's offered exhibits.

First. Section 170 of the Virginia Constitution provides that the General Assembly "may impose State franchise taxes," and may "make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation". Appellant's argument is that this should be construed to mean only domestic transportation corporations and not applied to the appellant which as a foreign corporation has been denied authority to do intra-state express business in Virginia. We do not agree. Section 170 authorizes the imposition of a franchise tax on transportation companies. The appellant is a transportation company, so defined by § 153 of the Constitution. It owns property and does an interstate express business in Virginia. Section 158 of the Constitution says that all property, except as in the Constitution provided, shall be taxed. Certainly no exception of foreign transportation companies is in terms made in § 170 nor do we think that such an exception can be fairly inferred. Limitation on the power of the legislature to impose the tax would have to proceed from a prohibition in the Constitution, not from absence of conferred authority. The powers of the legislature are plenary except as restrained by the Constitution. 4 Mich. Jur., Constitutional Law, § 31, p. 114. We cannot say that our constitutional and statutory provisions were not intended to and do not apply to the appellant, as was said in *State v. Plantation Pipe-Line Co.*, 265 Ala. 69, 89 So. 2d 549, to be true of the provisions of the Alabama Constitution and laws under former decisions to the effect that a foreign corporation doing

an exclusively interstate business in Alabama does not "do any business in this state."<sup>3</sup>

Section 58-546 provides that "Each express company" doing business in this State shall pay a franchise tax in lieu of taxes on other intangible property and in lieu of property taxes on its rolling stock. Appellant is an express company doing business, interstate at least, in this State. Section 58-547 fixes the rate and provides that where operations are partly within and partly without the State, the gross receipts from operations in the State shall be all receipts on business beginning and ending within the State and all receipts from the transportation within this State of express transported through, into, or out of this State. Appellant argues that in order for an express company to be subject to these provisions it must do either an intrastate business, or both an intrastate and interstate business, and since it does only an interstate business the statute does not apply to it. We are not impressed by the argument. Section 58-546 describes

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<sup>3</sup>*Commonwealth v. Appalachian Elec. Power Co.*, 193 Va. 37, 68 S. E. 2d 122, not referred to in argument by either party in the present case, does not control decision here. That case involved the interpretation of § 58-602 of the Code imposing a tax on the money of "every corporation doing in this State" an electric utility business. The question was whether the legislature meant to tax the money of such corporation on deposit in another State and derived solely from and used in connection with operations in such other State. It was held that in view of the legislative history of the statute; the administrative practice, long undisturbed by the legislature, of not taxing such money; and the legislative intent expressed in cognate statutes, particularly the statute limiting the tax on money earned by railroad companies to the part earned in this State, it was not the purpose of § 58-602 to tax money earned and kept in another State. The sentence in that opinion, "Since section 163 of our Constitution forbids a foreign corporation to do a public service business in this State, the statute looks only to Virginia corporations which conduct a utility business in Virginia", is to be taken in its setting and confined to the statute there construed. It does not serve to change the meaning of the clear language and purpose of the Code sections now under review.



the corporations which must pay the tax, and § 58-547 only fixes the rate and provides how the gross receipts to which it applies shall be identified. We detect no purpose in the statute to exempt the appellant because it earns only one kind of the receipts referred to.

Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross receipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. It did that by the method above stated. It is a method frequently resorted to in the fields of Federal and State taxation and doubtless necessary in the administration of tax laws. As a method it is obviously authorized and seems generally considered legal.

Second. Is the tax imposed by amended sections 58-546 ff. a property tax as held by the Commission and contended by the Commonwealth, or is it only a tax on the privilege of conducting an interstate express business in Virginia as contended by the appellant?

In the cases of *Commonwealth v. Baltimore Steam Packet Co.* and *Commonwealth v. Norfolk, Baltimore and Carolina Line, Inc.*, 193 Va. 55, 68 S. E. 2d 137, we held that the gross receipts tax imposed on the steamship companies pursuant to what was then § 58-575 of the Code was a property tax. We so held although the statutes there involved denominated the tax a license tax levied for the privilege of doing business in this State, and in addition to the annual registration fee and property tax levied by other statutes.

We there reviewed a number of Supreme Court decisions and concluded therefrom that the tax so assessed was not invalid as being a tax upon the privilege of carrying on an exclusively interstate business, but one fairly apportioned to the business carried on within the State, and was in its derivation and substance a tax on an element of value of the physical properties not otherwise taxed. Appeals from that decision were dismissed by the Supreme Court. *Baltimore Steam Packet Co. v. Commonwealth*, 343 U. S. 923, 72 S. Ct. 763, 96 L. ed. 1335; *Norfolk, Baltimore and Carolina Line, Inc. v. Commonwealth*, 343 U. S. 923, 72 S. Ct. 764, 96 L. ed. 1335.

Afterwards, in *Railway Express Agency, Inc. v. Commonwealth*, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757, the Supreme Court in a five to four decision reversed the holding of this court, 194 Va. 757, 75 S. E. 2d 61, that what was then § 58-547 of the Code, which imposed what that statute termed a license tax "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided," to be measured by the gross receipts from operations in this State, was a constitutionally valid property tax measured by the gross receipts from business done in Virginia.

The Supreme Court, in the majority opinion, said that the legislature had given a "trinity of characterizations to the tax," naming it "an annual license tax," "in addition to" the property tax levied by what was then the preceding § 58-546, and laid "for the privilege of doing business in this State," and "we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business".

The dissenting Justices were of the opinion that the name given the tax by this court "meshes with the state's taxing

scheme," and was "perfectly consistent with its earlier expressions on the subject". The majority opinion said the court had sustained and would sustain the power of the State to tax, without discrimination, all property within its jurisdiction, and to include in its assessment "or to assess separately" the value added by the property's assemblage into a going business, "even if that business be solely interstate commerce".

In the present case we are dealing with statutes different from those before the Supreme Court in the former *Railway Express Agency* case. Present § 58-546 imposes only "a franchise tax which shall be in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock" (emphasis added). Section 58-547 provides that this franchise tax shall be equal to 2.15% of gross receipts derived from operations in this State. Section 58-551 permits the locality to impose a tax on real estate and tangible personal property other than rolling stock on the basis of the assessment thereof made by the Commission for that purpose and at the same rate as imposed by the locality on the same kind of property. Section 58-553 provides that the taxes so imposed and authorized shall be in lieu of all other taxes and of all licenses on such companies, except the motor vehicle license or fuel tax prescribed by law or the annual registration fee.

As we pointed out in the *Steamship* cases, *supra*, our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of all public service corporations, providing for the imposition by local authorities of *ad valorem* taxes on tangible property on the basis of valuation fixed by the State Corporation Commission, and the imposition of a franchise tax measured by gross receipts for the support of the State government; and that in making the assessments of the tangible property for local taxation,

the Commission must *exclude* such franchise value as may be inherent therein, with the result that only the "bare bones" value of such property is taxed by the localities, leaving the intangible or "going concern" value to be taxed by the State for the protection and services rendered by it. The statutes now under consideration fit into and "mesh" with that scheme, and make plain, we think, the legislative intent, in keeping with the constitutional intent from which the legislation proceeded, that the franchise tax now imposed is in fact and effect a tax on intangible property of the company, of great value, which except for this franchise tax would be immune from the payment of any tax.

As stated by the Commission in its opinion, it has been the policy of Virginia since the adoption of its present Constitution in 1902 to impose franchise taxes measured by gross receipts instead of income taxes on public utilities. The Constitution itself (§ 177) imposed the tax on railroads and the tax on other companies was left to the legislature. When the proposed system was submitted to the Convention which formulated the Constitution, its Committee on Taxation and Finance reported in part:

"\* \* \* The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at,  
\* \* \*. \* \* \* If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of



the individual owner. \* \* \* Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857.

Consonant with the Committee's purpose, § 170 of the Constitution adopted by the Convention provides that the General Assembly "may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other* property". (Emphasis added.)

The fact that a franchise tax based on the gross receipts of a corporation is a tax on its intangible property was not created by the framers of the Virginia Constitution. More than six years before that Constitution was adopted the Supreme Court of the United States had held to that effect in the case of *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683, and (on petition to rehear) 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965, both opinions by Chief Justice Fuller. The Ohio statute required express companies to file a return and to include therein "a statement of their entire gross receipts, from whatever source derived," and in taxing the value of the property in the State the assessing board was directed to be guided "by the value of the entire capital stock of said companies, and such other evidence and rules" as would lead to the true value of their property within the State, in proportion to the entire property of the companies, as determined by the value of the capital stock thereof and the other evidence and rules. The assessing board fixed the value of the property of Adams Express Company to be taxed in Ohio at \$533,095.80. That company had reported the value of its real estate in Ohio at \$25,170 and its personal property, including moneys and credits, at \$42,065; its gross receipts from all sources within the State at \$282,181 and its 120,000 shares at \$140 to \$150 a share. The company contended that the market price of its

shares afforded no reasonable basis for estimating the value of its property and that the scheme of taxation was illegal, was a tax on interstate commerce and a denial of Due Process and Equal Protection.

The court held that the value of the property of the company was not limited to its tangible items, but included its "unit of use and management," and that its horses, wagons, and furniture, its contracts for transportation facilities and the capital necessary to carry on the business, whether represented in tangible or intangible property in Ohio, "possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others," referring to railroad, telegraph and sleeping car companies. The court said:

"\* \* \* The taxation is essentially a property tax, and, as such, not an interference with interstate commerce."

In the opinion denying a rehearing, 166 U. S. 185, 218-19, 17 S. Ct. 604, 605, 41 L. ed. 965, 977, the court said in reply to the contention of the express companies that they had in the State only certain tangible personal property which must be valued as other like property and upon such value alone the assessment must be made:

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. \* \* \* Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property

must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?"

Again it was said: "If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value." 166 U. S. at 221, 17 S. Ct. at 606, 41 L. ed. at 978.

"\* \* \* Do not these intangible properties — these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?" 166 U. S. at 225, 17 S. Ct. at 608, 41 L. ed. at 979.

*Great Northern Ry. Co. v. Minnesota*; 278 U. S. 503, 49 S. Ct. 191, 73 L. ed. 477, involved a Minnesota statute which imposed a tax, measured by gross receipts, upon all railroad companies, "in lieu of all taxes upon all of their property within the state". Of it the court said: "The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state." See also *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994; *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 32 S. Ct. 211, 56 L. ed. 459; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823, 115 A.L.R. 944; *Canton R. Co. v. Rogan*, 340 U. S. 511, 71 S. Ct. 447, 95 L. ed. 488.

The appellant contends that if the franchise tax be considered a property tax the amount of it is out of proportion to its property in Virginia and reflects the value of property outside of Virginia, and it complains that the Commission

made no dollars and cents valuation of the intangible or going concern value of the company's property. The appellant says that it reported the value of its real and tangible personal property in Virginia for 1956 at \$458,565.16, and instead of determining the going concern value of that property, the Commission assessed a franchise tax on its gross receipts calculated to have been derived from business in this State.

It is to be remembered, however, that the appellant owns under its contract the exclusive express privileges on 177 railroads of the country, as well as on truck lines, airlines and steamboat lines. From these contract privileges it earned in 1955, according to its Annual Report to the Commission, in gross operating revenues the sum of \$387,854,479, and paid to the carriers the net sum of \$146,522,248. Part of this operating revenues was earned in Virginia. These earnings added a large intangible value to the tangible value of the separate items of tangible properties in Virginia which were valued by the appellant at \$458,565.16. Based on the proportion of Virginia mileage to system mileage, as ascertained by the Commission, these express privileges on six railroads and five airlines in Virginia earned \$6,499,519 in 1955. Said the Supreme Court in *Adams Express Co. v. Ohio*, *supra*:

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man." 166 U.S. at 219-20, 17 S. Ct. at 605-6, 41 L. ed. at 977.



The going concern value of a business, as said by the Commission in its opinion, "depends on the value of the business as a going concern and not on the value of the land, machinery, equipment and tools used in the business." And it added:

"In the case before us the Delaware Company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in the same vehicles with the same employees. If the parent company should transfer title to all the property used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts."

The legislature, in the statutes set out above, provided that the tax should be equal to 2.15% of the gross receipts from operations in this State and in lieu of all other taxes

on intangible property and in lieu of property tax on rolling stock. For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The Commission thereupon ascertained in the best way it could the amount of these gross receipts to be \$6,499,519. If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility of an agreement about it as in prior years (*Railway Express Agency, Inc. v. Commonwealth*, 194 Va. 757, 75 S. E. 2d 61).

There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as *prima facie* correct, Constitution § 156(f). It is not incredible that a property which produced gross earnings of \$6,000,000 in one year would have a value of that much.

In *Adams Express Co. v. Ohio*, *supra*, the court said it was suggested that the company might have "bonds, stocks, or other investments which produce a part of the value of

its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. \* \* \* It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable." 166 U. S. at 222-3, 17 S. Ct. at 607, 41 L. ed. at 978.

Third. Appellant contends that the Commission, contrary to its former practice, classified its automotive equipment and trucks as rolling stock rather than as tangible personal property, thereby making the franchise tax displace a property tax on a larger value of the company's properties. As stated, § 58-546 provides that the franchise tax is "in lieu of property taxes on its rolling stock" as well as in lieu of taxes on all intangibles. The appellant argues that its automotive equipment and trucks should still be treated by the Commission as tangible personal property as in former years, to be taxed by the localities. Section 171 of the Constitution provides that tangible personal property "except the rolling stock of public service corporations" shall be subject to local taxation only. The result of the Commission's action is to relieve appellant's automotive equipment and trucks of local taxation and also of State taxation except as their value is reflected in the franchise tax. This value is stated to be \$262,719.63.

The Commonwealth says that this question is collateral to the issue here because this is a statutory proceeding to correct an erroneous assessment, not a proceeding to compel an assessment to be made. This is true, but considering the point on its merits we think the Commission was warranted if not required by the amended statutes to classify the automotive equipment and trucks as rolling stock. Un-

der the Constitution, § 171, *supra*, the legislature has the right to impose a State tax on rolling stock. *East Coast Freight Lines v. Richmond*, 194 Va. 517, 74 S. E. 2d 283. It seems logical to classify the automotive equipment and trucks used by the appellant in transporting express as rolling stock. The legislature so classified similar property in Article 11, Chapter 12, Title 58 of the Code, which requires the Commission to assess the rolling stock of motor vehicle carriers, "which shall include all busses, trucks, tractor trucks, trailers and semi-trailers and all other equipment which it is reasonably proper to class as rolling stock \* \* \*." Having the right to tax rolling stock, the legislature clearly directed in § 58-546 that this type of tangible property should be relieved of any other taxation than that imposed by the franchise tax to be paid by the company.

Fourth. Appellant's remaining contention is that the Commission erred in rejecting as immaterial its Exhibits 1 and 5 and so much of 3, 4 and 6 as did not relate to the year 1956.

Exhibit No. 1 was appellant's agreement with the railroads, offered to show that appellant's gross receipts were paid to the railroads after paying operating expenses and maintenance charges. Its annual report filed in the evidence showed that. No. 6 was a statement of the assessments and taxes of the Virginia Company, not the appellant, on its tangible and intangible property involved in its intrastate business from 1933 through 1956. No. 3 showed the gross receipts of the appellant from 1931 through 1956, except for 1954 and 1955, as determined by the Commission, together with other intangibles and tangible property and the tax imposed thereon for those years; No. 4, its tangible property, including automotive equipment and trucks, and the local taxes paid thereon for the years 1931-1956; No. 5,



the number, cost and market value of its automotive equipment in the cities of the State for 1956. Appellant says these last three were material to its contention, dealt with in "Third" above, that its automotive equipment and trucks should have been assessed in 1956 as tangible property and not as rolling stock.

We agree with the Commission that these offered exhibits were immaterial on the issue to which they were claimed to relate, *i.e.*, whether the franchise tax for 1956 imposed by amended § 58-546 was unconstitutional. While the exhibits might well have been received as information, and are in the record before us and have been referred to in argument so far as considered useful, yet any materiality to the questions raised is remote if at all existent, and it was not reversible error to refuse them.

For the reasons stated we hold that the franchise tax in question is a property tax, not prohibited by the Commerce Clause or other clauses of the Constitution of the United States, and validly imposed by the amended sections of the Code referred to. The order of the State Corporation Commission appealed from is accordingly

*Affirmed.*

## **APPENDIX C**

**Article 4, Chapter 12, Title 58 of Code of Virginia (1950)  
as amended**

**Article 4, Chapter 12, Title 58 of the Code of Virginia (1950) as amended by an act of the General Assembly of Virginia approved March 31, 1956 (Acts, 1956, Chapter 612):**

### **EXPRESS COMPANIES**

**§ 58-546. Franchise tax on express companies.**—Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

**§ 58-547. Amount of franchise tax.**—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State.

**§ 58-548. Annual report.**—Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding.

**§ 58-549. Assessments by Commission.**—The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of the real estate and tangible personal property

other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers.

§ 58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately sent by the clerk of the Commission to the Comptroller and to the company.

§ 58-551: Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein is situated real estate and tangible personal property other than rolling stock belonging to the company a certified copy of the assessment of the value of such property. The assessment shall show the character of the property and its value and location for the purpose of taxation in such city, town, county and district, so that city, town, county and district levies may be imposed upon the same at the same rate or rates as are imposed upon other real estate and tangible personal property located in such localities.

§ 58-552. Payment of State tax.—Such company shall pay into the State treasury by the first day of June following the assessment the franchise tax assessed against it.

§ 58-553. No other taxes on express companies; exceptions.—The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies, except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax,



heretofore or hereafter imposed by law, or the annual registration fee.

§ 58-554. Penalty for failure to pay.—Any express company failing to pay its franchise tax by the first day of June following the assessment shall incur a penalty thereon of five per cent, which shall be added to the amount of the tax.

§ 58-555. Penalty for failure to report.—Any such company failing to make the report required by § 58-548 within the time prescribed shall be liable to a fine of not more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to the defendant by rule to show cause.

Office - Supreme Court, U.S.

FILED

APR 1 1958

JOHN T. FEY, Clerk

In the  
**Supreme Court of the United States**  
October Term, 1958

No. ~~22~~ 38

**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant,*

v.

**COMMONWEALTH OF VIRGINIA,**

*Appellee.*

**Appeal from the Supreme Court of Appeals of Virginia**

**REPLY BRIEF OF APPELLANT IN OPPOSITION TO  
APPELLEE'S MOTION TO DISMISS AND TO ITS  
BRIEF IN SUPPORT OF THE MOTION TO DISMISS.**

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In the  
Supreme Court of the United States  
October Term, 1957

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No. 810

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RAILWAY EXPRESS AGENCY,  
INCORPORATED,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

---

Appeal from the Supreme Court of Appeals of Virginia

---

REPLY BRIEF OF APPELLANT IN OPPOSITION TO  
APPELLEE'S MOTION TO DISMISS AND TO ITS  
BRIEF IN SUPPORT OF THE MOTION TO DISMISS

---

**MOTION TO DISMISS**

Appellant submits for reasons discussed in its "Statement as to Jurisdiction" and for those assigned in the following reply brief that both questions involved in this appeal are

substantial Federal questions and that the second question so presented rests on no adequate non-Federal basis.

Appellee's Motion to Dismiss should therefore be denied.

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March 31, 1958

## REPLY BRIEF OF APPELLANT

Appellant, in replying to the arguments advanced in the brief filed on behalf of Appellee, will discuss such of them as seem material under the same headings and, as far as practical, in the same order in which they are dealt with by counsel for Appellee. Unless otherwise stated all italics are supplied.

### Statement of the Case

Appellee contends that the statement of the case included in Appellant's statement as to jurisdiction "requires amplification" and "is in error" in several respects.

#### 1.

#### *Appellant Should Not Be Taxed "as Though" It Were Doing an Intrastate Business*

Appellee contends by way of "amplification" that the facts recited on page 5 of its brief raise the question whether, notwithstanding its stipulation that Appellant "conducts only an interstate business in Virginia", it should be taxed as though doing an intrastate business in this State.

The stipulation referred to was entered into by counsel for Appellant, for the Commonwealth and for the State Corporation Commission, prior to the hearing before the Commission and was introduced and considered by it as a part of the evidence in the case. All the facts now referred to by Appellee were, therefore, before the Commission which considered them in the light of the stipulation.

In the light of them the Commission unanimously decided that:

"The peculiar feature of this case is that the Railway

*Express Agency does no intrastate business in Virginia*". (Italics by the Commission)

Moreover, the Commission, in its opinion from which the former appeal was perfected, heard and decided by the Virginia Court in 1953, [194 Va. 757], reached the same conclusion. It said:

*"The Delaware corporation created and uses the Virginia corporation not for the purpose of getting around the law but for the purpose of obeying the law. We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is engaged only in interstate business in the State of Virginia . . ."* (SCC Reports, 1952, p. 34)

In view of the foregoing holding, counsel for Appellant, an Assistant Attorney General for the Commonwealth and counsel for the Commission made a part of the records (Nos. 436 and 437) before the Virginia Court on that appeal a stipulation reading as follows:

*"4. Since the Commonwealth admits and the Commission has found that the taxpayer does no intrastate business in Virginia, the testimony and exhibits relating to that issue are not material on this appeal"*.

The "testimony and exhibits" relating to the manner in which both Appellant and the Virginia Company did business in Virginia had been fully developed in the hearings before the Commission in that proceeding and embraced all of the facts, among many others, presently referred to by Appellee on this appeal.

In the light of the record then before it and the stipulation above referred to, the Virginia Court had this to say on the prior appeal as to the nature of Appellant's business:



"Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, *where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931, following the affirmance by this Court of an order of the State Corporation Commission which denied the appellant the authority to do an intrastate express business in this State*". (194 Va. 757, 759)

When the case was before this Honorable Court on the prior appeal (October term, 1953), (record No. 163), the last mentioned stipulation again appeared in the record (page 20).

While it is true, therefore, that the facts referred to on page 5 of Appellee's brief "were not considered by this Court in the prior case" (Br. p. 13), they were not brought before it because Appellee admitted both before the Commission and the Virginia Court that *notwithstanding them* Appellant "does no intrastate business in Virginia".

The nature of Appellant's business has heretofore been before the Commission and the Virginia Court since 1929 (153 Va. 498), and it has never heretofore been contended that while engaged solely in interstate commerce, Appellant should be taxed "as though" it was engaged in intrastate commerce in Virginia. Such a suggestion implies that Appellant is doing indirectly what Section 163 of the Constitution says and what the Virginia Court held in *Railway Express Agency, Incorporated v. Commonwealth* (1929), 153 Va. 498 [a holding which was affirmed by this Court in

1931 (282 U. S. 440)], it may not do directly, namely, conducting the business of a public service corporation in intrastate commerce in this State. The Commission's opinion in the former case (SCC Reports 1952, p. 34) heretofore quoted from in this discussion *expressly decided* that the Virginia Company was organized by Appellant for the purpose of obeying, not violating the law. The Virginia Court affirmed that decision (194 Va. 759).

The *method* of operation employed by the Delaware and Virginia Companies has no bearing on the *nature* of the business transacted by either company. The Delaware Company uses the joint facilities for the transaction of its interstate business and the Virginia Company uses such facilities for the transaction of its intrastate business. *The nature of the business conducted by each is in no way affected by the facilities or personnel employed for that purpose.*

It is therefore respectfully submitted: (a) that Appellee, having "admitted" in the *former* proceeding and having "stipulated" in the *present* proceeding that Appellant does "only an interstate business" in Virginia; (b) that the Commission having *twice* found, *without objection from the Commonwealth*, that Appellant does, "only an interstate business" in Virginia, the first of which findings were affirmed by the Virginia Court on the former appeal; and (c) that, *since no cross-error was assigned to the Commission's failure to decide otherwise in the instant case*, Appellee should not now be heard to contend that, notwithstanding the interstate nature of its business, Appellant should, because of its ownership and control of the Virginia Company and their joint use of property and personnel, be taxed "as though" it did an intrastate business in Virginia.

*The Incidence of the Tax Is the Same*

Appellee takes exception to Appellant's statement that the effect of the 1956 amendment "was to change the nature but not the incidence of the tax" (Brief p. 6). Prior and subsequent to the amendment in question the incidence of the tax was and is *the gross receipts which the Commission found Appellant had derived from its interstate commerce*. Prior and subsequent to such amendment the tax was and is levied *in direct proportion to the extent to which the Commission has found that the privilege of carrying on Appellant's interstate business is exercised in Virginia*. Since the tax must be paid regardless of whether the company owns property in Virginia or not, or whether its operations are conducted at a profit or a loss, the tax is necessarily on the privilege of doing an interstate express business and nothing else. In its practical operation, the tax, therefore, is as the Commission, in its assessment stated it to be, upon "Gross Receipts to be taxed" in the amount of \$6,499,515.00.

*Appellant's Gross Receipts No Proper Measure of the Value of Its Operating Contracts or Ownership of the Virginia Company.*

Appellee also asserts that Appellant's contention that the tax constitutes a taking of its property without due process of law fails to recognize that (a) its existing contracts with railroads granting exclusive privileges to transport express matter over their lines and (b) its ownership of the entire capital stock of the Virginia company, are elements of property which Appellant has not considered in stating the value of its intangible property subject to State taxation.

If either or both of these elements of intangible property have value, there is nothing in the record to show *what* the Commission determined that value to be. Presumably, the Commission meant to decide, at least as to the value of Appellants contracts with the railroads, that they represented the going concern, or good-will value of its interstate business. However, as Mr. Justice Jackson pointed out on the former appeal, "to base the value (of its going concern, or good-will) on Appellant's gross revenues is to assume that every dollar of annual intake adds a dollar of intangible value to the company's assets, regardless of how much it costs in labor, interest or other expenses, including other taxes, to produce". For this obvious reason this Court then said:

"... But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. *But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. Cf. United States Glue Co. v. Oak Creek, 247 U. S. 321, 328-329.*"

If it be assumed, therefore, that Appellant's exclusive contracts with the railroads represents intangible property in the form of going-concern or good-will value subject to taxation in Virginia and should therefore have been, as Appellee contends, included in any summary of Appellant's intangible property, it is respectfully submitted that the State may not employ gross receipts as the sole measure of the value of such intangible property.



As to the stock of the Virginia company owned by Appellant, it may, at most, be said to represent the going-concern or good-will value of the intrastate business of that company as reflected by its gross receipts. These amounted in 1956 to \$612,715.55 upon which the Commission assessed and the Virginia company paid a "Franchise Tax" pursuant to Sections 58-546 and 58-547 as amended in 1956, in the amount of \$13,173.38. It had previously paid to Virginia without opposition, since it did solely on intrastate business in this State, License Taxes from 1933 (the year of its organization) through 1955 of \$280,199.53.

Any amounts which Appellant may have received *under its contract* with the Virginia company (it has never received any dividends on its stock) were, therefore, subject to the payment of these License or Franchise Taxes which, in the view of the Commission and the Virginia Court, were imposed upon the going-concern or good-will value of the intrastate business of *that* Company. There is no basis, therefore, for Appellee's contention that the value of this intangible property should have been included in Appellant's statement of the value of *its* intangible property subject to taxation in Virginia. It should not have been since such intangible property has already been taxed against the Virginia company. The Delaware company, because of its ownership of that company, has in fact already borne the burden of that tax.

4.

*Appellant's Rolling Stock Properly Included in Determining Percentage of Virginia Property Values to System Values.*

There is no factual basis for the statement in Appellee's brief that the figure of \$79,700,426.00 (of nationwide

depreciated system values) includes values of a class of property other than the classes located in Virginia and that, if limited to classes similar to those located in Virginia, such nationwide depreciated system values would be reduced by \$15,000,000.00 (Brief p. 8). The latter figure represents the depreciated system value of Appellant's rolling stock of which amount \$17,102.00 was attributed to Virginia in computing the percentage of total property values in Virginia of \$475,665.00 to the depreciated system value of all of the company's property of the same classes amounting to \$79,700,426.00.

It is true that the Franchise Tax in question is imposed in lieu of a State tax on Appellant's intangible property and rolling stock, but this fact has no bearing upon the question whether in determining the value of Appellant's going-concern or good-will in Virginia a disproportionate percentage of the total value of the company's properties has been attributed to this State. In fact, if Appellant's rolling stock is excluded from its depreciated system values and Virginia values of such property, the totals would represent \$64,305,480.00 and \$458,563.00 respectively. This would result in the Commission having attributed to the value of Appellant's property in Virginia (excluding rolling stock) 0.713% of the depreciated system value of the same kinds of property rather than 0.6% as pointed out in Appellant's "Statement as to Jurisdiction" (p. 18) with the result that 0.713% of Appellant's total property will have been considered to have a good-will or going-concern value of 1.7% of its total gross revenues.

### Argument

#### 1.

#### THE STATUTE

Appellee quotes from the opinion on the prior appeal for

the purpose of demonstrating that the decision of the majority of the Court was based upon "a trinity of characteristics" which the Virginia Legislature had given the license tax then under consideration. The *practical operation* of the prior license upon Appellant was to tax it in *direct proportion to the extent to which the Commission found it had exercised the privilege of carrying on an interstate business in Virginia, namely, the amount of gross receipts derived from that business*. It was for this reason, that is, the practical operation and effect of the statute, not merely because of the "trinity of characterizations" given it by the Legislature, that this Court held the tax imposed by former Section 58-547 to be a *privilege* and not a *property* tax.

The *practical operation* of the tax presently imposed by Section 58-546, although in name a *franchise* tax, is the same as that resulting from the imposition of the prior license tax, namely, its amount as determined, not by the value of any property, *but by the extent to which Appellant carries on its interstate business in Virginia, as measured by its gross receipts*. For the same reasons, therefore, the so-called franchise tax imposed by Section 58-546 is not a property tax but is in effect a *privilege* tax and therefore invalid under the former decision of this Court in *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, 363.

Appellee also makes reference in this connection to what was said in the "dissenting opinion" on the former appeal to the effect that "Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld." The amount of the tax was not argued by counsel on the former appeal *but its correctness was never conceded*. The discussion was directed solely to the question of the validity of the tax. In the instant case however the question of the amount of the tax was expressly

raised by counsel for Appellant and its operating report for the year 1955, introduced in evidence by counsel for the Commission, as well as Appellant's rejected Exhibits Nos. 3, 4 and 5, reveal the evidence upon which it relies in support of its present contentions in this respect. What is said in the "dissenting opinion" on the former appeal, therefore, can have no pertinent application to the record in the instant case.

## 2.

### THE METHOD OF DETERMINING THE TAX

Appellee asserts that "the failure of the Appellant to produce evidence in the State Tribunal in support of its Claim" that it "had no way of determining and was, therefore, unable to report for taxation the amount of its gross receipts earned in interstate business passing through, into or out of Virginia, as required by Section 58-547" is sufficient reason for the Court to deny a review of the State decision.

Nothing was shown in the proceeding and nothing can be shown on this appeal, to question the correctness of Appellant's statement. It was made under oath of a responsible official and filed as a part of its report to the Commission pursuant to § 58-548 of the Virginia Code. There was, therefore, no such "failure" on its part to make a report of its gross receipts derived solely from interstate commerce as warranted the Commission's action in undertaking to determine the amount thereof under authority of § 58-549. Appellant's alleged failure was due to its inability to provide the information required since it kept no records from which it could be ascertained. *It could not affirmatively prove a fact of which it had no knowledge.* It could only state as it did under oath what it said in this connection in Appellee's



brief. Its failure to report facts of which it had no knowledge is obviously no such "failure to report" information requested by the Commission as warranted it in devising a formula for determining Appellant's gross receipts in a manner not authorized by § 58-547 of the Code.

Appellee contends that despite Appellant's "failure to produce any evidence to support its claim" in this connection, its "mathematics appear to be greatly in error" in contending that "the Virginia assessment is 'unrealistic' because 1.7% of its total gross revenues is attributed to Virginia whereas . . . there is located in Virginia only about 0.6% of its total assets of like class as those located in Virginia" (Brief p. 15).

This is said to be true because on page 8 of Appellee's Statement as to Jurisdiction it lists the various classes of property owned by it in Virginia as totaling \$458,565.16 as compared with a nationwide system value of the same classes of property of \$79,700,426.00 whereas, on page 18 "while using the same nationwide system value, the 'like' Virginia located property has grown to \$475,665.00 (a discrepancy of over \$17,000, or a little over 3%) (Brief p. 15).

As previously pointed out the difference between the two figures to which Appellee refers is represented by the value of Appellant's rolling stock in Virginia, which, while not taxed by the Commission under the 1956 amendment to § 58-546, certainly represents property values of Appellant having taxation situs in Virginia, for the purposes of comparing the total value of its Virginia property with the system value of its properties of like kind and class.

Appellee complains of Appellant's mathematical computation of *what would have to be the value of its intangible property*. (\$27,947,932) in order to produce, on the basis

of the tax rate applicable to the intangible property of other public service corporations (50¢ per \$100.00), a tax of \$139,739.66. Appellee does not, however, appear to challenge Appellant's contention that this \$28 million figure is *out of all proportion to the real going concern value of Appellant's property which the Commonwealth claims to be taxing*. Rather, it claims that in its calculations Appellant has used the wrong tax rate (50¢ per \$100.00) and that, when the amount of the tax is divided by the rate of 2.15%, the going concern value of Appellant's property is found to be \$6,499,519, *the same as the gross receipts it is claimed to have earned in 1955*.

This latter assertion is most revealing. It shows conclusively that *what the Commonwealth claims is the incidence of the tax*—the going concern value of Appellant's property—is, in fact, *the gross receipts that property can be made to produce in Virginia*. The result is, therefore, *a direct tax on gross receipts* and not a tax on *property* measured by gross receipts fairly apportioned. It is axiomatic to say that a State may not impose a direct tax on gross receipts derived solely from interstate commerce.

Moreover, it is utterly unrealistic to assert that the going concern value of Appellant's property is *exactly equal to the gross receipts earned with that property in any given year*, particularly when such gross receipts are determined on the *unit* theory by applying, as the Commission applied, the ratio of Virginia mileage to system mileage of the railroads operating in Virginia over the lines of which Appellant transported express matter. This formula gives no consideration to the value of tangible property (real and personal) of Appellant located in Virginia, the going concern value of which the Commonwealth has undertaken to determine in the manner embodied in its formula. And, in any case, gross

receipts as distinguished from net income is no proper measure of the going concern value of a taxpayer's property. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321.

### Conclusion

For the foregoing reasons it is respectfully submitted that the two questions presented by this appeal are not only substantial but of considerable public importance and fully justify a review by this Honorable Court.

Respectfully submitted,

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**JAMES R. BROWNING, Clerk**

**Supreme Court of the United States**

**October Term, 1957**

No. [REDACTED] **38**

**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant*

**v.**

**COMMONWEALTH OF VIRGINIA,**

*Appellee*

**Appeal from the Supreme Court of Appeals of Virginia**

**BRIEF FOR THE APPELLANT**

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# Supreme Court of the United States

October Term, 1957

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No. 810

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RAILWAY EXPRESS AGENCY,  
INCORPORATED,

*Appellant*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee*

Appeal from the Supreme Court of Appeals of Virginia

## BRIEF FOR THE APPELLANT

### OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is reported at 199 Va. 589 and 100 S. E. 2d 785. The opinion of the State Corporation Commission of Virginia has not yet been officially reported. For text of opinion see R. 43.<sup>1</sup>

### JURISDICTION

The judgment of the Supreme Court of Appeals was entered December 2, 1957 (R. 81). Notice of appeal to this

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<sup>1</sup>Reference to the pages of the printed transcript of record are made herein as follows: (R. ....). *Italics are supplied unless otherwise indicated.*

Court was filed December 31, 1957 (R. 82), and probable jurisdiction was noted April 14, 1958 (R. 85). The jurisdiction of this Court rests on 28 U. S. C. 1257(2).<sup>2</sup> This case meets the requirement of that statute since the decision was rendered by the highest court of the State of Virginia and held that the Virginia gross receipts franchise tax on express companies was not repugnant to the Commerce Clause of the Constitution of the United States and, in the amount assessed, did not deprive Appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment.

### QUESTIONS PRESENTED

Appellant, a Delaware Corporation, is engaged in the business of transporting express matter in interstate and intrastate commerce in every state of the United States except the State of Virginia, *where it does solely an interstate business*, having been denied permission to engage in *intrastate* business there because Section 163 of the Virginia Constitution prohibits a foreign corporation from engaging in business characterized as that of "a public service corporation".

In 1954 this Court held a *license* tax then imposed by Virginia upon gross receipts derived by Appellant solely from its interstate business to be a *privilege* and not a *property* tax (Appellant was also subject to and paid all taxes, State and local, on its property in Virginia) and therefore in violation of the Commerce Clause of the Constitution of the United States. *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359. In 1956 the Legislature of Virginia changed the name (though not the incidence) of the tax to a fran-

<sup>2</sup>62 Stat. 929.

chise tax and imposed the same in lieu of taxes "on the other intangible property" and "rolling stock" of express companies, these being the *only* subjects upon which the State may impose a property tax under the provisions of Section 171 of the Virginia Constitution and Section 58-10 of the Code of Virginia.

In 1956 the State Corporation Commission determined the amount of Appellant's interstate gross receipts subject to "franchise" taxation ~~by~~ computing, on a mileage basis, the proportion which its receipts from express transported over certain railroads and airlines *operating in Virginia* bore to the total receipts from express transported by Appellant over the entire lines of *such* railroads and airlines.

Appellant contended before the Commission that the franchise tax (1) was a license or privilege tax and therefore invalid as a burden on interstate commerce, (2) was improperly apportioned to Virginia on a mileage basis, and (3) as a property tax denied Appellant due process of law since it was out of all proportion to the amount of all property taxes in lieu of which it was assessed. The Virginia Commission denied each of these contentions. The Virginia court, affirming the action of the Commission, held that the franchise tax was a property and not a license or privilege tax, that it did not violate the Commerce Clause, and, in the amount assessed by the Commission, did not deprive Appellant of its property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Therefore, the questions here presented are —

1. Is the franchise tax an excise or privilege tax upon Appellant's right to transact solely an interstate express.

business in Virginia and therefore in contravention of the Commerce Clause of the Constitution of the United States?

2. Is the amount of the franchise tax, imposed upon Appellant for the year 1956 as a property tax, determined in such a manner as to deprive Appellant of its property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

### STATUTE INVOLVED

The Franchise Tax is found in Article 4, Chapter 12 of Title 58 of the Code of Virginia, 1950, as amended by the 1956 General Assembly (1956 Acts, Chapter 612), which consists of Code Sections 58-546 through 58-555. The entire article is printed in Appendix A, page 29 of this brief. The same article as it existed in 1954 when it imposed the license tax held unconstitutional by this Court (347 U. S. 359) is printed in Appendix B; page 33 of this brief. The two sections of the present article imposing the franchise tax provide:

"§ 58-546. *Franchise tax on express companies.*—Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

"§ 58-547. *Amount of franchise tax.*—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation



within this State of express transported through, into, or out of this State."

## STATEMENT

In 1918 the American Railway Express Company was organized at the suggestion of the Director General of Railroads of the United States to enable him to make one operating agreement with it rather than a separate agreement with each of the several independent express companies then operating in the United States. At the suggestion of the Interstate Commerce Commission, Appellant was organized in 1928 by eighty-six of the major railroads of the Nation and in 1929 acquired the properties of the American Railway Express Company (R. 9, 15). Sixty-eight of the railroads now own all of the stock of Appellant (R. 9).

When it was organized, Appellant promptly became qualified to do an *intrastate* and *interstate* business in every state of the United States except Virginia (R. 15). The Virginia State Corporation Commission, however, refused to grant Appellant authority to an *intrastate* business in Virginia because of the prohibition of Section 163 of the State Constitution against any foreign corporation conducting in Virginia the business or exercising any of the powers or functions of a public service corporation (R. 15) (Virginia S.C.C. Reports, 1929, p. 252). That decision was affirmed by the Supreme Court of Appeals of Virginia, 153 Va. 498, 150 S. E. 419 (1929) and by this Court 282 U. S. 440 (1931). As a consequence of the State's own policy, affirmed by these decisions, Appellant has not since 1932 done any business in Virginia which the State has the power to prohibit *but has done only such as it can conduct under protection of the Commerce Clause of the Federal*

**Constitution.** To handle such intrastate express as falls within the power of the State to control, a separate Virginia subsidiary was organized in 1931 under the name of Railway Express Agency, Incorporated, of Virginia (herein called the Virginia Company). That local company since 1932 has continued to handle all *intrastate* express business and Appellant all *interstate* express business in Virginia (R. 15).

The operating arrangement between the Virginia Company and Appellant is set forth in a written contract made in 1932 and supplemented in 1942 (R. 100, 105). Appellant's operating arrangement with the one hundred seventy-seven railroads over which it handles express shipments (these include the sixty-eight lines that own the stock of Appellant) is set forth in a written contract separately executed by each railroad and known as the "Standard Express Operations Agreement." The current agreements were made in 1954 (R. 13). The form of this agreement which is Exhibit 1 (see original exhibits with the record) follows the pattern of prior agreements. Appellant also has contracts with truck lines, air lines and steamboat lines for express transportation privileges (R. 29).

The Standard Express Operations Agreement with the railroads provides Appellant with exclusive rights to conduct an express transportation business over the contracting railway lines and requires Appellant to pay to the railroads as compensation for their services in transporting its express matter, *all* of its income after operating expenses and other deductions and credits allowable under the Internal Revenue laws (R. 86). The revenue thus received by the railroads operating in Virginia is subject to taxation under Section 58-519 of the Code of Virginia (1950) as a part of their gross receipts.

The Virginia Company has paid all taxes (privilege and property) assessed against it since 1932 and there is no question here concerning *any* tax levied against that Company (R. 16, 92). Prior to 1951 Appellant likewise paid all taxes assessed against it by Virginia but it paid under protest, as a burden on interstate commerce, the license tax levied pursuant to the provisions of Section 58-547 as it existed prior to 1956, and its antecedent sections (R. 22, 90). That tax was called an annual license tax and was imposed, in addition to the property taxes provided for in the Code, *for the privilege of doing business in the State*.

When this Court decided in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951), that a Connecticut tax imposed for the privilege of doing solely an interstate business in that state, measured by net income attributable to such business, violated the Commerce Clause of the Federal Constitution, Appellant for the first time sought refunds from the State Corporation Commission of Virginia of the *license* taxes paid Virginia on the ground that the tax violated the Commerce Clause of the Federal Constitution as applied to Appellant.

The Supreme Court of Appeals of Virginia affirmed the decision of the Virginia Commission that the license tax was a *property tax on the intangible elements of value generated by the employment in business of the physical properties of express companies*, and was not violative of the Commerce Clause of the Federal Constitution. *Railway Express Agency, Inc. v. Virginia*, 194 Va. 757, 75 S. E. 2d 61 (1953). This Court reversed the decision of the Virginia court on the ground that the tax was in reality a license tax imposed for *the privilege of doing solely an interstate business in this state and therefore repugnant to the Commerce*

Clause. 347 U. S. 359 (1954). The refunds sought for the years 1950 and 1951 were thereupon granted. Similar refunds were made by the Commission for the years 1952 and 1953. No further *license* taxes were assessed against Appellant.

In 1956 Virginia substituted a "franchise tax" for the previously imposed "license tax." The taxes are identical in all material respects: *both are measured by gross receipts*, the rate is the same, and doing business in Virginia is the basis for the liability for the tax. The two taxes differ only in that (i) they have different names, (ii) the "franchise tax" is *in lieu of*, rather than in addition to, certain other state property taxes and (iii) the "franchise tax" is not *expressly stated* to be for the privilege of doing business in Virginia.

In its return of property for the year 1956 pursuant to Section 58-548 of the Code of Virginia (R. 110-112, Exhibit 10), Appellant reported that it had no way of determining what part of the receipts derived by it from its business was earned "in business passing through, into or out of this State," as contemplated by the article imposing the franchise tax (Code Section 58-547) (R. 38). From the return it appeared that it owned intangible personal property (money on hand and on deposit) of a value of \$120,110.70; tangible personal property (consisting of automotive equipment and trucks) of a value of \$239,465.24 and \$23,254.39, respectively; office furniture and equipment of a value of \$42,884.83, and real estate of a value of \$32,850.00, a total property value in Virginia on the taxable date of \$458,565.16 (R. 110-112).<sup>2</sup> From the same return

<sup>2</sup>Under the provisions of Section 171 of the Constitution and Sections 58-9 and 58-10 of the Code, *tangible personal property* (except rolling stock) and real estate are segregated for purposes of local taxation only; the State may tax *intangible personal property* and rolling stock.



it also appeared that the depreciated *nationwide system value* of the same classes of company property was \$79,700,426.00 (R. 95-98, 112; see table p. 22, *infra*).

Upon receipt of Appellant's 1956 return of property, the Virginia Commission devised a formula for determining the gross receipts derived by Appellant from its interstate business in Virginia (R. 34, 38, 108) which it ascertained to be \$6,499,519., or 1.7% of its total gross system revenue of \$387,241,764., and assessed a franchise tax thereon in the amount of \$139,739.66, which was paid under protest. (R. 37, 28, 110, Exhibit 7).

Appellant then filed a petition under Section 58-672 of the Code of Virginia for correction of the assessment of the 1956 franchise tax and for a refund of the tax paid on the ground that the tax constituted (1) a burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution and (2) the taking of Appellant's property and a denial to it of due process of law under the Fourteenth Amendment to the Federal Constitution.

Prior to 1950 Appellant's express refrigerator cars (the only railroad cars it owned) had been treated by the Virginia Commission as "rolling stock" of a "Freight Car Company" and assessed as such under Article 5, Chapter 12, Title 58 of the Code of Virginia. Because of the limited mileage traveled by such "rolling stock" in Virginia, it had no substantial taxable *situs* in Virginia and the taxes imposed on it were of nominal amounts.<sup>4</sup> However, no tax was imposed upon Appellant's rolling stock (refrigerator cars) for the years 1950-1955 because the Virginia Commission accepted Appellant's contention that it was not a Freight Car Company within the meaning of this section of the Code and that its

<sup>4</sup>In 1943 \$2.40, in 1944 88¢, in 1945 \$1.60, in 1946 \$1.05, in 1947 no assessment, in 1948 \$75.10, in 1949 \$489.80 (R. 27).

rolling stock was therefore not taxable against it as *such* (R. 27).•

The Virginia Commission made no assessment upon Appellant's money or rolling stock for the year 1956 upon the theory that the franchise tax imposed by Section 58-546 was in lieu of any property tax thereon. However, had such a tax been assessed upon its money at the rate of 20¢ on the \$100 as imposed by § 58-546 prior to the 1956 amendment, it would have amounted to \$252.21. Had the Commission assessed Appellant's express refrigerator cars as "rolling stock" upon the basis employed in the formula applied for determining such taxes in 1950 (on 1949 values), it would have amounted to \$427.56 (Ex. 13, R. 113), *an aggregate tax on Appellant's money on deposit and the refrigerator cars as "rolling stock" of \$679.77.*

The Virginia Commission held that the franchise tax upon Appellant's gross receipts was a *property tax upon the good will or going concern value of its interstate business, in Virginia measured by such gross receipts* which the Commission determined on a mileage basis. The Commission also held that the tax *as so assessed* did not constitute a denial to Appellant of due process of law under the Fourteenth Amendment. The Supreme Court of Appeals of Virginia affirmed both findings in its decision of December 2, 1957.

## ARGUMENT

### I.

#### The Franchise Tax Violates the Commerce Clause

This case differs from the usual Commerce Clause case since the question of whether the taxpayer is engaged *exclu-*

sively in interstate commerce is not involved. Appellant is a foreign public service corporation and Section 163 of Virginia's Constitution prohibits the conduct of an intrastate business in the State by such a company. Furthermore, the parties have stipulated and the Virginia Court has affirmed that Appellant has done exclusively an interstate business in Virginia (R. 68, 88).

The sole question here, involving the Commerce Clause, is whether the franchise tax as applied to Appellant is a property tax or a tax on the privilege of carrying on an exclusively interstate business in Virginia.

# I.

## UNCONSTITUTIONAL AS A PRIVILEGE TAX

If the franchise tax is a privilege tax, then under the decision in *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951), it is clearly unconstitutional as applied to Appellant doing exclusively an interstate business in Virginia. This Court said in that case:

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The Constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555 (measured by percentage of capital stock and surplus). See *Interstate Pipe Line Co. v. Stone*, 337 U. S. 662, 669, *et seq.* (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph v. Carter & Weekes Co.*, 330 U. S. 422; *Freeman v. Hewitt*, *supra*." (p. 609)

Thus the *Spector Motor Service* case reaffirmed the principle of the *Alpha* and *Ozark* cases that a state tax, even though fairly apportioned and nondiscriminatory, cannot be levied directly or indirectly on the privilege of doing an exclusively interstate business in the taxing state. This well settled principle was applied by this Court in its decision which held invalid the license tax levied under the earlier Virginia statute. *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359 (1954).

Appellant's only business in Virginia consists of (i) originating the interstate movements which require local pick-up of parcels, (ii) terminating the movements which require delivery, and (iii) movement through the state. This court has frequently held that such local incidents are integral parts of an interstate movement and cannot be the bases for a state license or privilege tax. *Railway Express Agency v. Virginia*, 347 U. S. 359 (1954); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389 (1952); *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951); *New Jersey Bell Telephone Company v. State Board of Taxes and Assessments*, 280 U. S. 338 (1930).

Since the business of Appellant in Virginia involves no taxable localized incidents the franchise tax is invalid under the *Spector* case if it is a privilege tax as Appellant contends and as its operating incidents plainly indicate.

The *Spector* case was soon recognized as a long needed reclarification of the limitation on the power of the state to levy taxes on the privilege of carrying on an exclusively interstate business. The principle of this landmark decision has been applied and followed in numerous states, including



Alabama,<sup>5</sup> California,<sup>6</sup> Georgia,<sup>7</sup> Indiana,<sup>8</sup> Mississippi,<sup>9</sup> New York,<sup>10</sup> Pennsylvania,<sup>11</sup> Washington,<sup>12</sup> and West Virginia.<sup>13</sup> The principle has been recognized even where state taxes have been sustained because of what were considered controlling factual distinctions. See e.g., *Fontenot*

<sup>5</sup>*City of Gadsden v. Roadway Express, Inc.*, 37 Ala. App. 613, 73 So. 2d 765 (1954), city license tax invalid as applied to interstate motor carrier; *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), cert. den. 352 U. S. 943 (1956), state franchise tax invalid as applied to interstate pipeline company.

<sup>6</sup>*National Schools v. City of Los Angeles*, 135 Cal. App. 2d 311, 287 P. 2d 151 (1955), cert. den. 350 U. S. 968 (1956), city gross receipts license tax invalid as applied to receipts for correspondence course to out-of-state students.

<sup>7</sup>*Stockham Valves & Fittings v. Williams*, 213 Ga. 713, 101 S. E. 2d 197 (1957), cert. granted 356 U. S. 911 (1958) (App. Pend., No. 33, 1958 Term), net income tax invalid as applied to foreign corporation engaged solely in interstate commerce.

<sup>8</sup>*Gross Income Tax Division v. Surface Combustion Corporation*, 232 Ind. 100, 111 N. E. 2d 50 (1953), cert. den. 346 U. S. 829 (1953), gross receipts tax invalid as applied to income from sales in interstate commerce.

<sup>9</sup>*Coleman, Attorney General v. Trunkline Gas Co.*, 218 Miss. 285, 63 So. 2d 73 (1953), cert. den. 346 U. S. 824 (1953), privilege tax invalid as applied to interstate pipeline company.

<sup>10</sup>*United Piece Dye Works v. Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 683 (1953), aff. 307 N. Y. 780, 121 N. E. 2d 617 (1954), cert. den. 348 U. S. 916 (1955); *United Airlines v. Joseph*, 282 App. Div. 48, 121 N. Y. S. 2d 692 (1953), aff. 307 N. Y. 762, 121 N. E. 2d 557 (1954), city gross receipts license tax invalid as applied to businesses engaged solely in interstate commerce.

<sup>11</sup>*Roy Stone Transfer Corporation v. Messner*, 377 Pa. 234, 103 A. 2d 700 (1954); *Commonwealth v. Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100 (1956), cert. den. 352 U. S. 952 (1956), net income tax, though characterized a "property tax", invalid as applied to foreign corporations engaged solely in interstate commerce.

<sup>12</sup>*B. F. Goodrich Co. v. State*, 38 Wash. 2d 663, 231 P. 2d 325 (1951), cert. den. 342 U. S. 876 (1951), gross receipts privilege tax invalid with respect to income from purely interstate sales.

<sup>13</sup>*American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S. E. 2d 56 (1951), gross receipts privilege tax invalid with respect to receipts from interstate barge operations.

*v. John I. Hay Company*, 228 La. 1031, 84 So. 2d 810 (1956); *Minnesota v. Northwestern States Portland Cement Company*, 250 Minn. 32, 84 N. W. 2d 373 (1957), *Prob. Juris. noted*, 355 U. S. 911 (No. 12, 1958 Docket).

Unless the franchise tax is a property tax it is clearly unconstitutional as a violation of the Commerce Clause.

## 2.

### THE FRANCHISE TAX IS A PRIVILEGE TAX AND NOT A PROPERTY TAX

This Court in the prior appeal analyzed this same tax and held that although levied as a "license tax, in addition to certain property taxes," for the privilege of doing business in Virginia it was "a privilege tax and one which cannot be applied to an exclusively interstate business" (347 U. S. 359, 369). Following that decision three changes were made in the tax by the Legislature of Virginia in an effort to give the statute a gloss of constitutionality but these changes were changes of form and not changes of substance and they did not alter the true nature of the tax, which this Court had condemned as unconstitutional.

(1) The first change was to call the tax a "franchise tax" rather than a "license tax". But this Court has held many times that labels are not controlling and that it will determine for itself the practical operation of the tax.

In *Railway Express Agency v. Virginia*, *supra*, this Court said:

"While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value,

including going-concern value, and prohibited taxation of gross receipts from interstate commerce, 'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect,' *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, in which inquiry 'we are concerned only with its practical operation.' *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 280. See *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443-444." (p. 363)

In *Wisconsin v. J. C. Penney Co.*, *supra*, it was stated, "But the descriptive pigeonhole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction" (p. 443). See also *Wagner v. City of Covington*, 251 U. S. 95 (1919), *Storaasli v. Minnesota*, 283 U. S. 57 (1931), *McLeod v. DiLworth Co.*, 322 U. S. 327 (1944), *Society for Savings v. Bowers*, 349 U. S. 143, 151 (1955), *City of Detroit v. Murry Corp.*, 355 U. S. 489 (1958).

(2) The second change is that the tax is now levied "in lieu of", rather than "in addition to", certain other property taxes. But again labels are not controlling. The franchise tax by its very terms is a direct tax on gross receipts of express companies which measures the extent of the privilege exercised and not the property value produced by the exercise of the privilege, or any other property value as this Court found on the former appeal:

"... But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege.

of doing a volume of business which would yield that revenue, just as the Legislature indicated. *But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. Cf. United States Glue Co. v. Oak Creek, 247 U. S. 321, 328-329.*" (p. 367)

See also *Southern Railway Company v. Kentucky*, 274 U. S. 76 (1927).

(3) The third change is that the tax is no longer levied *expressly* for the privilege of doing business in Virginia. This, however, can make no difference since the sole basis for levying the tax is that the taxpayer *has done business in Virginia*. Surely the mere dropping of the significant phrase "for the privilege of doing business in Virginia" cannot change the true nature or practical effect of the tax. It conforms to its statutory description as one whose impact is squarely upon *gross receipts*, without consideration of its effect on the value of any of the classes of property recognized in the other sections of the statute.

Thus the privilege tax, once called a "license tax" and now called a "franchise tax", is for all practical purposes the same tax which this Court held unconstitutional on the former appeal.

The determining factor in this Court's decision in the prior appeal (which, significantly, neither the Virginia Commission nor the Supreme Court of Appeals dealt with in their opinions in this case) is the principle that a direct tax on gross receipts, as distinguished from a net income or *ad valorem* tax, does not measure property values and therefore simply is not a property tax. Nowhere has this basic differ-



ence been more clearly recognized and stated than by this Court in *United States Glue Co. v. Oak Creek*, 247 U. S. 321 (1918):

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (p. 328-329)

While the Virginia Commission and Supreme Court of Appeals held that the franchise tax was a tax upon the intangible *property* of Appellant represented by the going-concern value of its business in Virginia which is wholly interstate, and is levied in lieu of state taxes on Appellant's intangible property and "rolling stock", *the amount of the tax is determined by the statute to be "two and three-tenths per cent of the gross receipts derived from operations in this state"* precisely as was the case in the tax considered and held invalid on the prior appeal.

It is significant that the Virginia Commission did not determine the amount or value of the intangible property in lieu of which the tax on gross receipts is imposed, and there is therefore no amount—expressed in dollars—spe-

cifically appearing in the record from which it can be determined *what* was found to be the going-concern value of Appellant's business in Virginia. Its failure to do so is readily explained by its own action in the actual assessment of the tax against Appellant where it included the statement "Gross receipts to be taxed—\$6,499,519" (R. 109).

The tax is therefore levied *in direct proportion to the extent to which the Virginia Commission found that the privilege of carrying on Appellant's interstate business is exercised in Virginia*. The tax has no relation to the value (net profits) produced by the conduct of that interstate business. Since the tax must be paid regardless of whether the operations of the Company produce *value* by operating at a profit, or produce *no value by operating at a loss*, it is necessarily on the *privilege of doing an interstate express business and nothing else*.

The Virginia Court held that the principal element of intangible property value of Appellant which is sought to be taxed is its exclusive express privileges on the Nation's railroads acquired under the Standard Express Operations Agreement which is described as "an absolute national monopoly". No one would question the fact that Appellant's exclusive express privileges on the railroads are valuable contract rights. But the patent fallacy in the reasoning of the court is that gross receipts do not measure or even indicate the *value* of those contractual rights. Gross receipts only reflect the *extent* to which those rights are exercised, however unprofitably.

Actually, the Standard Express Operations Agreement requires *all* revenue of Appellant to be paid over to the owning railroads after operating expenses and other allowable deductions and credits under the Federal Internal Revenue laws (R. 86). However, Virginia does not suffer in conse-

quence for the payments by Appellant to the railroads doing business in Virginia constitute a part of *their* gross receipts and are taxable as such under Section 58-519 of the Code of Virginia (1950).

There is no showing in the record that the payments by Appellant to the railroads under the Standard Express Operations Agreement are adequate to compensate them for the actual cost of transporting Appellant's express shipments. Manifestly, a tax of \$139,739.66 determined by apportioning Appellant's gross receipts is not a measure of the value of Appellant's exclusive express privileges. So far as the record in the case discloses these privileges, these contractual rights, may be without monetary value.

In short, gross receipts are absolutely no measure of property values, above all the value of a contractual right to exercise a privilege. Therefore, the franchise tax is not in fact a property tax but a tax which every express company which does business in Virginia is required to pay *in proportion to the extent the privilege or right is exercised. The gross receipts of such companies measure only the extent of the business done, not the values, if any, produced by the conduct of the business.*

While the power to tax is inherent in the states, they have delegated to the United States the exclusive power to regulate the privilege of engaging in interstate commerce by including the Commerce Clause in the Constitution (U. S. Const., Art. I, Section 8, Cl. 3). This constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress. Therefore, since the franchise tax as applied to Appellant is in reality a tax for the *privilege* of doing business in Virginia and not a *property* tax, it is in

contravention of the Commerce Clause and therefore invalid.

## II.

### **If the Franchise Tax Is a Property Tax, It Violates the Due Process Clause of the Fourteenth Amendment As Applied to Appellant.**

When Appellant was before this Court previously the only issue presented was the validity under the Commerce Clause of the tax as a *license* tax measured by a percentage of its gross receipts pursuant to a predetermined formula. No question was then raised as to the *amount* of the tax or the method of assessment. In the present case, however, the constitutionality of the amount has been raised, and the issue posed that even if the tax is considered to be a property tax and thus otherwise constitutionally valid, does the amount or the manner in which it was assessed deprive Appellant of its property without due process of law?

#### 1.

### **THE METHOD OF APPORTIONING APPELLANT'S GROSS RECEIPTS TO BE TAXED RESULTS IN TAXING PROPERTY OUTSIDE VIRGINIA IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

The Virginia Court held that the franchise tax imposed by Section 58-546 of the Code (i) was enacted pursuant to Section 170 of the State Constitution which authorizes the imposition of "state franchise taxes" on transportation, industrial or commercial corporations and provides that in imposing such taxes the Legislature may make them *in lieu* of taxes upon other property, in whole or



in part, of such corporations, and (ii) is a tax on the intangible property of Appellant, representing the good will or going-concern value of its interstate business in Virginia (R. 70-78). It is most significant, however, that the Commission did not attempt to ascertain or to assess the value of *that* element of Appellant's intangible property. On the contrary, in apparent recognition of the true nature of the tax, the Commission made its assessment against Appellant in the following manner:

"Gross receipts to be taxed .....	\$6,499,519
Tax at 2.15% .....	\$ 139,739.66"
	(R. 109)

Since Appellant had no way of determining and therefore was unable to report for taxation, the amount of its gross receipts earned "in business passing through, into or out of" Virginia as required by Section 58-547 of the Virginia Code (Rec. p. 38), the Commission devised a formula for ascertaining such gross receipts. In making this determination, the Commission applied to Appellant's total system gross receipts a factor equal to the proportion which the mileage in Virginia of the major railroads and airlines over which express is shipped by Appellant in this State bore to the total system mileage of all *such carriers* (R. 108). The resulting \$6,499,519 of gross receipts is 1.7% of Appellant's total gross revenue in 1955 of \$387,241,764 (R. 108). This result is so arbitrary and unreasonable as to amount to a denial of due process. This is demonstrated by the following table which shows that of Appellant's *total assets of like class as those located in Virginia* (of \$79,700,426) only \$475,665, or less than 0.6% was situated in Virginia in 1956.

**Comparison of System and Virginia Property Values of  
Like Kind as of December 31, 1955.**

		SYSTEM VALUES*	VIRGINIA VALUES†
Cash .....		\$34,610,796	\$120,110
Real Property			
Land .....		\$4,983,791	
Bldgs. ....	\$13,478,776		
Less Deprecia- tion .....	<u>6,550,618</u>		
		<u>6,928,158</u>	
		11,911,949	32,850
Rolling stock .....	\$17,876,761		
Less Deprecia- tion .....	<u>2,481,815</u>		
		15,394,946	17,102
Automotive equip- ment .....	\$32,566,698		
Less Deprecia- tion .....	<u>18,979,174</u>		
		13,587,524	239,465
Trucks .....	\$ 3,296,475		
Less Deprecia- tion .....	<u>2,259,707</u>		
		1,036,768	23,254
Office furniture and equipment ..	\$ 4,673,550		
Less Deprecia- tion .....	<u>1,515,107</u>		
		3,158,443	42,884
Total .....		<u>\$79,700,426</u>	<u>\$475,665</u>

\*R. 95, 97, 98, 112.

†R. 111, 113.



It is apparent that in making the assessment of the franchise tax against Appellant, the Virginia Commission in effect decided, and the Virginia Court held, that Appellant's properties in this State *are three times more productive* of gross receipts than is its property of like kind as a whole. There is no reasonable basis upon which such a conclusion could be based and therefore the Virginia Commission established and the Virginia Court upheld a valuation of Appellant's *intangible* property attributable to Virginia, that reflects the value of other property beyond the taxing jurisdiction of the State.

As previously pointed out, the Commission concluded, and the Virginia Court held, that the foregoing property, tangible and intangible, did not reflect the so-called worth arising from the going concern or use value of Appellant's system, or interstate business in Virginia. If the business of Appellant in or out of this State has good will or going concern value over and above its other tangible and intangible property, such going concern value in Virginia would have to amount to \$27,947,932 in order to produce an intangible personal property tax of \$139,739.66 computed at Virginia's intangible personal property rate of 50¢ for each \$100 of value. It taxes the credulity of anyone to believe that the Appellant's property in Virginia alone has an intangible (going concern) value of \$27,947,932 when its tangible assets in Virginia total only \$475,665. If so, the *intangible* (going concern) value of the Appellant's property *wherever located*, if ascertained by applying the Virginia rate (50¢ on the \$100 of value) on intangibles to a tax of \$8,325,698 (at 2.15 per cent of the Appellant's *total* gross operating revenues of \$387,241,764) would have a value of \$1,677,992,260. Manifestly, total corporate assets of only \$138,621,859 can have no such good will or going concern value and Virginia *therefore* is seeking to tax the property of Appellant located outside of this State.



In attempting to tax the going concern or use value of Appellant's tangible assets—an added value which results from the utilization of these assets in a nationwide express business—the Virginia Court has over-looked the fact that such going concern or use value *must be regarded as spread among the various states in the proportions in which the tangible assets are distributed*. The decisions of this Court establish quite clearly that no mileage formula, or other device, may be used to ascribe to one state a disproportionate part of the value of an interstate system and that an attempt to do so is in effect the taxation of property outside the jurisdiction of the state in violation of the due process clause of the Fourteenth Amendment. *Fargo v. Hart*, 193 U. S. 490 (1904); *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298 (1912); *Illinois Central R. R. Co. v. Greene*, 244 U. S. 555 (1917). See also *Panhandle Eastern Pipe Line Company v. Michigan*, 346 Mich. 50, 77 N. W. 2d 249 (1956).

This is precisely what Virginia has done in the instant case. As we have seen there were ascribed to Virginia, where only 0.6% of Appellant's property is located, gross receipts amounting to 1.7% of Appellant's total gross revenue and, consequently, the same proportion of the total going concern value of all of Appellant's assets. It must follow that Virginia claims that Appellant's property over which it has jurisdiction is proportionately almost three times more productive of revenue than all its other assets of like kind wherever located and that therefore this property has a going concern value three times greater than its similar property located anywhere else in the nation. There is clearly no basis for any such unrealistic claim.

Any system or method of state taxation which produces such an unjust and discriminatory result as has been accomplished by the assessment of the franchise tax in the instant

case is invalid under the doctrine announced in the foregoing authorities and deprives Appellant of its property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

## 2.

**THE FRANCHISE TAX ASSESSED AGAINST APPELLANT IS NO JUST EQUIVALENT OF THE TAX IN LIEU OF WHICH IT WAS IMPOSED AND THEREFORE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

Apart from the arbitrary and unfair apportionment formula by which it was assessed, the amount of the tax alone establishes its illegality. The franchise tax by its own terms is declared to be in lieu of taxes upon all the "other intangible property" and "rolling stock" of express companies. This Court has frequently stated that such an in lieu tax however determined will be upheld only if the tax does not exceed the amount of an ordinary property tax in lieu of which such tax is imposed. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 696 (1895); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453 (1918); *Pullman v. Richardson*, 261 U. S. 330, 338 (1923). The principle has also been recognized by this Court in *Northwestern Mutual Life Insurance Company v. Wisconsin*, 247 U. S. 132 (1918); *Alpha Cement Company v. Massachusetts*, 268 U. S. 203 (1925); *Great Northern Railway Company v. Minnesota*, 278 U. S. 503 (1929). See also 51 Am. Jur., *Taxation*, Section 872, page 778.

Under Virginia's system of segregation of property for state and local taxation authorized by Section 171 of its Constitution and implemented by Sections 58-9 and 58-10 of the Code of 1950, the only property of the Appellant in Virginia which the state (as distinguished from the localities) had the power to tax was (i) \$120,110.70 of

cash on hand and on deposit (R. 112) which, at the rate applied to Appellant (prior to the 1945 amendment of § 58-546) of 20¢ per \$100 of value would have produced a tax of \$252.21 and (ii) Appellant's "rolling stock" which would have produced a tax of \$427.56 (See p. 9, *supra*), a total tax of \$679.77. The Commission made no assessment upon either class of such property (money and rolling stock) for the year 1956 upon the theory that the franchise tax imposed by Section 58-547 was in lieu of any *property* tax thereon.<sup>14</sup> *Plainly a franchise tax of \$139,739.66 was no just equivalent of such property taxes at ordinary rates.*

The foregoing comparison does not take into consideration any enhancement of value of such property (money and rolling stock) *because of its use in a going concern*, but money has no going concern value—it will buy only so much in goods or services whether used by a successful business, or one which has no good will. And even if all of Appellant's property, except money, in Virginia, including tangible property and real estate which the state under its system of segregation of property for state and local taxation is forbidden to tax, is taken into consideration, the total value of all such property (\$325,555) certainly cannot be said to have a going concern value of \$27,947,932 *which would be the value necessary to produce a tax of \$139,739.66 at the*

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<sup>14</sup> Neither did the Commission make any assessment of the value of the Company's "automotive equipment" and "trucks" as tangible personal property since it changed its traditional classification of such property in 1956 from *tangible* personal property (subject to local taxation only) to "rolling stock," thus attempting to increase the value of the property subject to State taxation in lieu of which the franchise tax was said to be imposed. The total value of such "automotive equipment" and "trucks" was \$262,719.63, and even if treated as "rolling stock" subject to State taxation (at the rate of \$2.50 on the \$100 of value heretofore imposed upon such property) the additional tax, in lieu of which the franchise tax imposed by Section 58-546 was assessed, would have been only \$6,567.99.

ordinary rate of tax on intangibles (50¢ per \$100 of value).

Because the tax imposed so grossly exceeds what would be a tax at ordinary rates on Appellant's property in Virginia even when valued as part of a going concern, it cannot be regarded as a valid *in lieu* tax, since it obviously reaches Appellant's property located outside Virginia and is therefore, under the prior decision of this Court cited above, unconstitutional and void under the due process clause.

### CONCLUSION

In conclusion it is respectfully submitted that:

1. The franchise tax imposed by §58-547 of the Code of Virginia is unconstitutional and void in that it imposes a *privilege* tax on Appellant's right to do solely an interstate express business in Virginia and thus contravenes the Commerce Clause of the Federal Constitution.

2. Appellant's tangible and intangible property in Virginia does not warrant the imposition of a franchise tax of \$139,739.66 as a *property* tax on the going concern value of its interstate business in this State. Such tax is therefore unconstitutional and void in that it deprives Appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The franchise tax in the amount of \$139,739.66 is unconstitutional and void since when measured by Appellant's interstate gross receipts, is greatly in excess of what would be legitimate as an ordinary property tax upon the intangible property and rolling stock of Appellant *in lieu* of which such franchise tax is imposed.

For one or all of the foregoing reasons the judgment and order of the Virginia State Corporation Commission assess-



ing Appellant with the franchise tax in the amount of \$139,739.66 for 1956 and the decision of the Supreme Court of Appeals of Virginia approving such assessment should be reversed, the assessment corrected and expunged from the assessment records and the amount of the tax refunded to Appellant.

August 21, 1958

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## **APPENDIX A**

### **THE FRANCHISE TAX**

**Article 4, Chapter 12, Title 58 of the Code of Virginia  
(1950) as Amended by an Act of the General  
Assembly of Virginia Approved March  
31, 1956 (Acts, 1956, Chapter 612)**

**Article 4, Chapter 12, Title 58 of the Code of Virginia (1950) as amended by an act of the General Assembly of Virginia approved March 31, 1956 (Acts, 1956, Chapter 612):**

### **EXPRESS COMPANIES**

**§ 58-546. Franchise tax on express companies. —** Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

**§ 58-547. Amount of franchise tax. —** The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State.

**§ 58-548. Annual report. —** Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding.

**§ 58-549. Assessments by Commission. —** The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of

the real estate and tangible personal property other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers.

§ 58-550. Copies of assessment for Comptroller and company. — A certified copy of the assessment when made shall be immediately sent by the clerk of the Commission to the Comptroller and to the company.

§ 58-551. Copy of assessment for local authorities. — The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein is situated real estate and tangible personal property other than rolling stock belonging to the company a certified copy of the assessment of the value of such property. The assessment shall show the character of the property and its value and location for the purpose of taxation in such city, town, county and district, so that city, town, county and district levies may be imposed upon the same at the same rate or rates as are imposed upon other real estate and tangible personal property located in such localities.

§ 58-552. Payment of State tax. — Such company shall pay into the State treasury by the first day of June following the assessment the franchise tax assessed against it.

§ 58-553. No other taxes on express companies; exceptions. — The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies,



except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law, or the annual registration fee.

§ 58-554. Penalty for failure to pay. — Any express company failing to pay its franchise tax by the first day of June following the assessment shall incur a penalty thereon of five per cent, which shall be added to the amount of the tax.

§ 58-555. Penalty for failure to report. — Any such company failing to make the report required by § 58-548 within the time prescribed shall be liable to a fine of not more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to the defendant by rule to show cause.

## **APPENDIX B**

### **THE LICENSE TAX**

**Article 4, Chapter 12, Title 58 of the  
Code of Virginia (1950)**

**Article 4, Chapter 12, Title 58 of the  
Code of Virginia (1950)**

§ 58-546. Taxes on property of express companies.— Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they have taxable properties located, the taxes levied on such property as follows:

(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

(3) There shall be no local levies assessed on such intangible personal property or money;

(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the proceeds of which local levies shall be applied as is provided by law.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 923.)

§ 58-547. Annual license tax.—Every such company for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)

§ 58-548. Annual report.—Every company doing an express business in this State on any railroad, steamboat, vessel, bus, truck, aircraft of any kind or on any other kind of vehicle or instrumentality of transportation shall report annually on or before the first day of May to the Commission all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding showing particularly in what city, town, county and school district the property is located and classifying the same under the following heads:



(1) All of its real and personal property of every description in this State showing the cost and market value of such property;

(2) The total number of miles operated within and without this State for the year ending December thirty-first next preceding;

(3) The gross receipts from operation entirely within this State and if operations are partly within and partly without this State the entire gross receipts from operation for the year ending December thirty-first next preceding;

(4) Any and all other information, in such manner and in such detail as the Commission shall require. (1928, p. 148; 1942, p. 408; Tax Code, §218.)

§ 58-549. Assessment of value of property.—The Commission shall, after thirty days' notice previously given by it to the president or other proper officer, assess the value of the property of each of such companies.

Should any such company fail to make the report required by this article on or before the first day of May the Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of the company within this State and shall ascertain the information required herein. In the execution of such duty the Commission shall be authorized and empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately forwarded by the clerk of the Commission to the Comptroller and to the president or other proper officer

of each such company. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein the property belonging to the company is situated a certified copy of the assessment made by the Commission of such company's property. The assessment shall definitely show the character of the property and its value and the location for the purpose of taxation in each city, town, county and district, so that city, town, county and district levies may be imposed upon the same. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-552. Payment of tax.—Such company shall pay into the State treasury by the first day of October following the assessment the taxes assessed against it. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-553. No other taxes on express companies.—The amount of taxes and licenses imposed by this article and authorized to be imposed shall be in lieu of all other taxes and licenses, State, County and municipal, upon all the property, franchises and privileges of such companies; provided, that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, §219; 1948, p. 924.)

§ 58-554. Penalty for failure to pay.—Any such company failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of

five per centum, which shall be added to the amount of the taxes. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-555. Penalty for failure to report.—Any such company failing to make the report required by § 58-548 within the time herein prescribed shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to any such defaulting company to appear before the Commission and show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

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**Supreme Court of the United States.**

**October Term, 1958**

**No. 38**

**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant*

**v.**

**COMMONWEALTH OF VIRGINIA,**

*Appellee*

**Appeal from the Supreme Court of Appeals of Virginia**

**REPLY BRIEF FOR THE APPELLANT**

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# Supreme Court of the United States

October Term, 1958

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No. 38

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RAILWAY EXPRESS AGENCY,  
INCORPORATED,

*Appellant*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee*

---

Appeal from the Supreme Court of Appeals of Virginia

---

## REPLY BRIEF FOR THE APPELLANT

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Appellant, in replying to the arguments advanced in the brief filed on behalf of Appellee, will discuss such of them as seem material under the same headings and, as far as practical, in the same order in which they are dealt with by counsel for Appellee. Unless otherwise stated all italics are supplied.

### I.

#### Statement of the Case

Appellee contends that the statement of the case included in Appellant's statement "requires amplification" in some respects.

Appellee contends in this connection that the facts recited on pages 3-4 and 37-39 of its brief raise the question whether, notwithstanding its stipulation that Appellant "conducts only an interstate business in Virginia" (R. p. 87), it should be taxed as though doing an intrastate business in this State. The facts referred to relate primarily to the relationship between Appellant and the Virginia Company and their joint use of equipment and personnel.

Appellee contends that Appellant, under the terms of its joint operating agreement with the Virginia Company, has assigned to the latter "its intrastate privileges in Virginia" and that the latter company is thereby "obligated to perform the obligations of Appellant imposed by contracts between Appellant and such carriers concerning intrastate operations in Virginia (Brief pp. 3, 4). This is true because, and only because, of the policy of Virginia toward foreign public service corporations, as defined in Section 163 of its Constitution. As this Court observed in its opinion on the former appeal:

"As a consequence of the State's own policy, *this appellant does no business in Virginia which the State has power to prohibit* but does only such as it can conduct under protection of the Commerce Clause of the Federal Constitution. To handle such intrastate express as falls within the power of the State to control, a separate Virginia subsidiary necessarily was organized." 347 U. S. 359, 361)

The method thus employed as a practical means of securing intrastate express service for the people of Virginia was, in fact, *suggested by the Virginia Court* in its opinion affirming the decision of the Commission denying Appellant authority to do an intrastate business in this State. The Virginia Court said:



"No insurmountable obstacle stands in the way of plaintiff in error, if it desires to do intrastate business in this State. *It may organize a corporation under the laws of the Commonwealth to do intrastate business,* and if it desires to do so then merge with such domestic corporation under the provisions of sections 3821-3827 of the Code of Virginia 1924." (153 Va. 498, 513)

This Court lent its approval to the foregoing suggestion of the Virginia Court when, in affirming that decision, it said:

"We may add that *as suggested by the State Court* the difficulties created by the Constitution of Virginia probably will not prove hard to overcome when it is found that they must be met." (282 U. S. 440, 444)

It follows, therefore, that what has been done by Appellant through its ownership of the Virginia Company is the result of corporate activity and procedure having the sanction of the Virginia Court as well as this Court as a means of permitting Appellant to conduct its interstate business in Virginia and provide, through the Virginia Company, facilities for the conduct of an *intrastate* express business in this State *without itself engaging in the latter activity*.

The stipulation that Appellant "conducts only an interstate business in Virginia" (R. p. 87) was entered into by counsel for Appellant, for the Commonwealth and for the State Corporation Commission, *prior* to the hearing before the Commission and was introduced and considered by it as a part of the evidence in the case (R. p. 15). *All the facts now referred to by Appellee* were, therefore, before the Commission *which considered them in the light of the stipulation*.

In the light of them the Commission unanimously decided that:

"The peculiar feature of this case is that the Railway Express Agency *does no intrastate business in Virginia*". (R. p. 50) (Italics by the Commission)

Moreover, the Commission, in its opinion from which the former appeal was perfected, heard and decided by the Virginia Court in 1953 (194 Va. 757), reached the same conclusion. It said:

"The Delaware corporation created and uses the Virginia corporation not for the purpose of getting around the law but for the purpose of obeying the law. We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is engaged only in interstate business in the State of Virginia . . ." (SCC Reports, 1952, p. 34)

In view of the foregoing holding, counsel for Appellant, an Assistant Attorney General for the Commonwealth and counsel for the Commission made a part of the records (Nos. 436 and 437) before the Virginia Court on the appeal from the Commission's decision in that proceeding a stipulation reading as follows:

"4. Since the Commonwealth admits and the Commission has found that the taxpayer does no intrastate business in Virginia, the testimony and exhibits relating to that issue are not material on this appeal".

The "testimony and exhibits" relating to the manner in which both Appellant and the Virginia Company did business in Virginia had been fully developed in the hearings before the Commission in that proceeding and embraced all

of the facts, among many others, presently referred to by Appellee on this appeal.

In the light of the record *then* before it and the stipulation above referred to, the Virginia Court had this to say on the prior appeal as to the nature of Appellant's business:

"Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, *where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931,* following the affirmance by this Court of an order of the State Corporation Commission which *denied the appellant the authority to do an intrastate express business in this State*". (194 Va. 757, 759)

When the case was before this Honorable Court on the prior appeal (October term, 1953), (record No. 163), the last mentioned stipulation again appeared in the record (page 20).

While it is true, therefore, that *some* of the facts referred to on pages 3-4 and 37-39 of Appellee's brief "were not considered by this Court in the prior case" (Br. p. 38), they were not brought before it *because* Appellee admitted both before the Commission and the Virginia Court that *notwithstanding them* Appellant "does no intrastate business in Virginia" (R. p. 87).

The manner in which Appellant's business is conducted in Virginia has theretofore been before the Commission and the Virginia Court since 1929 (153 Va. 498), and it

has *never heretofore been contended* that while engaged solely in interstate commerce, Appellant should be taxed "as though" it was engaged in intrastate commerce in Virginia because it has contracted with certain railroads in such manner as to obligate itself to render express service in Virginia (both in interstate and intrastate) in respect to which it has organized its wholly owned subsidiary, the Virginia Company, to perform, and has assigned to it the right and obligation to perform, Appellant's undertakings in respect to *intrastate* express shipments and has made a contract with the Virginia Company whereby property and personnel are jointly employed to render both interstate and intrastate services.\*

The *method* of operation employed by the Delaware and Virginia Companies has no bearing on the *nature* of the business transacted by either company. The Delaware Company uses the joint facilities for the transaction of its interstate business and the Virginia Company uses such facilities for the transaction of its intrastate business. *The nature of the business conducted by each is in no way affected by the facilities or personnel employed for that purpose.*

Moreover, the uncontradicted testimony of the witness C. J. Jump, Vice President, Administration and Finance, of Appellant, shows that it would be inefficient and uneconomical to operate the two companies in Virginia except under

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\* The agreement between the Delaware and Virginia Companies was first entered into on March 7, 1932, and was amended January 22, 1942 (R. p. 100 *et seq.*) Copies of these contracts have been exhibited *each* year with the Appellant's annual report to the Commission. Their relation to the joint operations of the Delaware Company and the Virginia Company has, therefore, been known to the Commission since the Delaware Company was denied authority to transact an *intrastate* business in Virginia and the Virginia Company was organized by it, as a wholly owned subsidiary, for the purpose of conducting such business.



a joint agreement such as that complained of by Appellee. Mr. Jump testified:

"Q. So whether the title of this property we are speaking of is in the Virginia Company or the Delaware Company depends on the decision of the Delaware Corporation, it could be either one or the other Company, or intermingled?

"A. I don't know whether that is a question I could answer or not. There may be some legal connotation which I don't know about, but, so far as operational operations are concerned, it would be my thought that the Express Company, operating under the reasonable way they operate — we were forced by law to set up the Virginia Company to do the intrastate business, *and in my opinion the intrastate business in the State of Virginia would not support a company that was operating with personnel and equipment and facilities entirely separate and by itself.* If the Virginia Company were owned by the citizens of the State of Virginia, I think they would probably want to make an arrangement with the Railway Express Agency, which carries on the interstate business, for the use of joint employees, joint equipment, joint forms, and so forth. Our receipt forms carry the name of the Delaware Company. Opposite the name of the Delaware Company, it says, 'For interstate shipments,' and also now under that is the name of the Virginia Company, and opposite the name of the Virginia Company it says, 'For intrastate shipments.' The two companies have undertaken to operate in an efficient, economical operation, *but, in fact, the business is carried on by separate companies.*"  
(R. p. 24)

Appellee's contention in this respect implies that Appellant is doing indirectly what Section 163 of the Constitution says and what the Virginia Court held in *Railway Express*

*Agency, Incorporated v. Commonwealth* (1929), 153 Va. 498 [a holding which was affirmed by this Court in 1931 (282 U. S. 440)], it may not do directly, namely, conducting the business of a public service corporation in intrastate commerce in this State. The Commission's opinion in the former case (SCC Reports 1952, p. 34) heretofore quoted from in this discussion *expressly decided* that the Virginia Company was "created and used" by Appellant for the purpose of obeying, not violating the law. The Virginia Court affirmed that decision (194 Va. 757).

It is therefore respectfully submitted: (a) that Appellee, having "admitted" in the *former* proceeding and having "stipulated" in the *present* proceeding that Appellant does "only an interstate business" in Virginia; (b) that the Commission having *twice* found, *without objection from the Commonwealth*, that Appellant does "only an interstate business" in Virginia, the first of which findings was affirmed by the Virginia Court on the former appeal; and (c) that, *since no cross-error was assigned to the Commission's failure to decide otherwise in the instant case*, Appellee should not now be heard to contend that, notwithstanding the interstate nature of its business, Appellant should, because of its ownership and control of the Virginia Company and their joint use of property and personnel, be taxed "as though" it did an intrastate business in Virginia.

## II.

### Gross Receipts Do Not Measure Going Concern Value

It has been the contention of Appellee throughout this litigation that the tax in question was a *property tax* on the "going concern value" of express companies (Brief p. 8).

Having in mind the particular type of property which Appellee asserts is reached by this tax, Appellant asserted in its Opening Brief as it has consistently maintained in the courts below that the tax was *not a property tax but a tax on the extent to which Appellant had conducted its interstate express business in Virginia* and therefore invalid under *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951) and the decision in this case on the prior appeal—347 U. S. 359 (1954) (Brief pp. 14-20).

Appellee contends that gross receipts are a measure of going concern value and that therefore the tax may properly be called a property tax. This contention wholly ignores the economic fact of life, recognized by this Court as early as *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 697 (1894), that while the *value* of business property results from the *use to which it is put*, this value "*varies with the profitability of that use.*" Gross receipts measure the *volume* not the *profitableness* of such use.

In support of its contention, Appellee cites and quotes from cases approving the use of gross receipts to measure a *privilege or excise tax*. No cases cited however, except *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918), and *United States Express Company v. Minnesota*, 223 U. S. 335 (1911), involved a tax that was said to be a *property tax*. In those two cases, which were decided prior to *United States Glue Co. v. Oak Creek*, 247 U. S. 321 (1918), the taxpayers *were engaged in both intrastate and interstate commerce* in Minnesota. Therefore, the *apportioned gross receipts taxes* sustained as *property taxes* in these cases could properly have been upheld as taxes on the *privilege of doing an intrastate business in Minnesota* measured by the apportioned gross receipts from both interstate and intrastate commerce in that state. Thus, while the deci-

sions in *Cudahy* and *United States Express Company* reached the correct result, they are inconsistent with the subsequent decisions of this Court to the extent that they approved the use of gross receipts as a measure of the value of the property of an wholly interstate transportation company including its going concern value.

As pointed out in Appellant's Opening Brief (p. 17) this Court in *United States Glue Co. v. Oak Creek*,<sup>2</sup> *supra*, upheld a net income tax on the ground that it burdened interstate commerce only indirectly, but recognized the obvious fact that gross receipts are a measure of the *volume* of business done by a taxpayer but not the *value* produced by such business as does net income. As Appellee indicates in its brief, this principle was also recognized in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 295 (1917) and *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938) (Brief pp. 17-18). It was also inferentially recognized in *Southern Railway Co. v. Kentucky*, 274 U. S. 76 (1927), cited in Appellant's Opening Brief (p. 16), where the Court in discussing valuation of railroad properties for purposes of taxation said:

"If taken separately it is clear that because of *lack of net earnings, no substantial intangible elements of value could reasonably be attributed to the railroad of that Company.*" (p. 83).

Appellee advances the novel idea that since this Court found on the prior appeal that the Virginia gross receipts tax on express companies was a privilege tax, that decision is no authority for the point that gross receipts do not measure going concern value (Brief pp. 18-19). Appellee ignores the fact that one of the Court's principal reasons for holding



that the former tax was a privilege tax was that, since it was measured by gross receipts it could not be sustained as a property tax. The Court said:

"The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. But we have declined to regard mere gross receipts as a sound measure of going concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume." (347 U. S. 359, 367)

Appellee overstates Appellant's contention when it says that Appellant asserts that *any* tax measured by gross receipts, whether or not apportioned, is a privilege tax (Brief p. 19). The correct statement of Appellant's contention is that when, as in this case, the going concern value of a transportation business is sought to be taxed as a *property* tax, fairly apportioned gross receipts may not be used as the measure of such intangible worth. The use of gross receipts as a measure of the tax in such a situation *establishes* the tax as a privilege or franchise tax on the volume of business done and not as a tax on the property employed in that business.

In *Western Livestock v. Bureau of Internal Revenue*, 303 U. S. 250 (1938), relied upon by Appellee, the New Mexico gross receipts tax on a publishing company which had its only office and place of business in New Mexico was held to be a tax on the *privilege of conducting such business in New Mexico* measured by gross receipts from intrastate and interstate business done by the taxpayer. Mr. Justice Stone's comments concerning the use of gross receipts to measure going concern value of a business referred to by

Appellee (p. 21) were not necessary to the decision, are clearly inconsistent with later opinions of this court and (although not so expressly stated in the opinion) were apparently based upon *Cudahy* and *United States Express Co.*, *supra*, which, as was pointed out above, have been subsequently ignored by the Court.

The case of *Maine v. Grand Trunk R. Co.*, referred to by Appellee (p. 20), falls in the same category as *Western Livestock*. Both intrastate and interstate business were involved and the tax was levied for the privilege of doing business in Maine. A careful reading of the opinion makes it clear that Mr. Justice Holmes was mistaken in suggesting in *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217, that the gross receipts tax was sustained on the ground that it was levied in lieu of *ad valorem* taxes (Brief p. 20). According to the Court's opinion it was sustained as a proper measure of an excise tax—"the value of the privilege conferred". As was later said in this connection by Mr. Justice Holmes in *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298:

"It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, given in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226, . . . and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items." (p. 301)

In summary, aside from *Cudahy* and *United Express* and Mr. Justice Stone's dictum in *Western Livestock*, Appellee has no authority for its contention that gross receipts may be used to measure going concern value. The contrary position, on which Appellant relies, is manifestly sound economically and has been consistently accepted by this Court. The use of such receipts establishes the tax as a *privilege* tax and not a *property* tax.

Appellee contends that the franchise tax presently imposed by Section 58-547 is part of a system or scheme of taxation designed by the Constitution of Virginia and the statutes enacted in pursuance thereof whereby the goodwill or going-concern value of a transportation corporation may be separately taxed as a part of the state's general scheme of *property* taxation. While Appellant denies the correctness of this assertion *when applied to foreign public service corporations engaged solely in interstate commerce* (which they are prohibited from doing by Section 163 of the Constitution), it is respectfully submitted, for the reasons hereinbefore stated, that the use of *gross receipts* as a *measure* of the *value of the going-concern worth* of such a corporation whether a part of a system of taxation or when standing alone, renders the tax invalid. Gross receipts do not determine the going-concern *value* of such a business but merely the extent of the use of its property in such business, whether profitable or unprofitable.

### III.

#### The Amount of the Tax .

Appellee points out that Appellant's assertions against the "amount" of the tax are made "in spite of the fact that Appellant failed or refused to report in Virginia the amount of its receipts earned from business passing through, into or out of the State" (Brief p. 32).

It is true that Appellant answered the request for this information on the forms supplied by the Commission with the word "none" (R. p. 110). It is perfectly obvious, however, that this was a clerical inadvertence and that the answer given was intended to apply to the preceding question calling for the "amount" of "all receipts from business be-

beginning and ending *within* this state" (R. p. 110). Appellant conducted no intrastate business in Virginia and therefore had no such receipts. Its answer is wholly consistent with the facts elicited by this question.

It is equally apparent from the protest which the Commission's witness Dickerson stated was attached to its report that Appellant was unable, not unwilling, to state its gross receipts derived from its interstate business in Virginia *since it had no way of determining them*. This witness testified:

"Q. And there is attached to that a rider which states, 'This company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned "in business passing through, into, or out of this State."' That statement appears on the protest made a part of the return, does it not?

"A. Yes." (R. p. 38)

As a result of the foregoing Appellee points out that the Commission invoked the provisions of Section 58-549 and proceeded to determine the tax based on the "best and most reliable information" available (Brief p. 32). Appellee not only concedes but urges in argument that Section 58-547 imposing the franchise tax *makes no attempt to apportion gross receipts derived solely from intrastate commerce*. Neither did the form promulgated by the Commission prescribe or suggest any method by which Appellant's gross receipts derived from transportation of express matter "through, into and out of this State" should be determined.

Nothing was shown in the proceeding and nothing can be shown to question the truthfulness of the statement in the protest attached to Appellant's return, that it had no way of



determining what part of its receipts were derived from business—"passing through, into or out of this State." *It could not affirmatively prove a fact of which it had no knowledge.* There was, therefore, no such "failure" on the part of Appellant to make the report required by the Commission as is contemplated by Section 58-549. Appellant's failure was due to its *inability* to provide the information requested and not to any purposeful *refusal*, which is obviously the kind of refusal intended to be dealt with by the Virginia statute and the kind of refusal which might otherwise estop Appellant from attacking the "amount" of the tax under well settled principles of the law of taxation.

Assuming, however, that Appellant's failure, not its refusal, to report the information requested justified the Commission in making an apportionment, it is submitted that the formula employed shows on its face that the Commission allocated to Virginia a percentage of Appellant's gross receipts not properly or fairly attributable to Virginia in a constitutional sense.

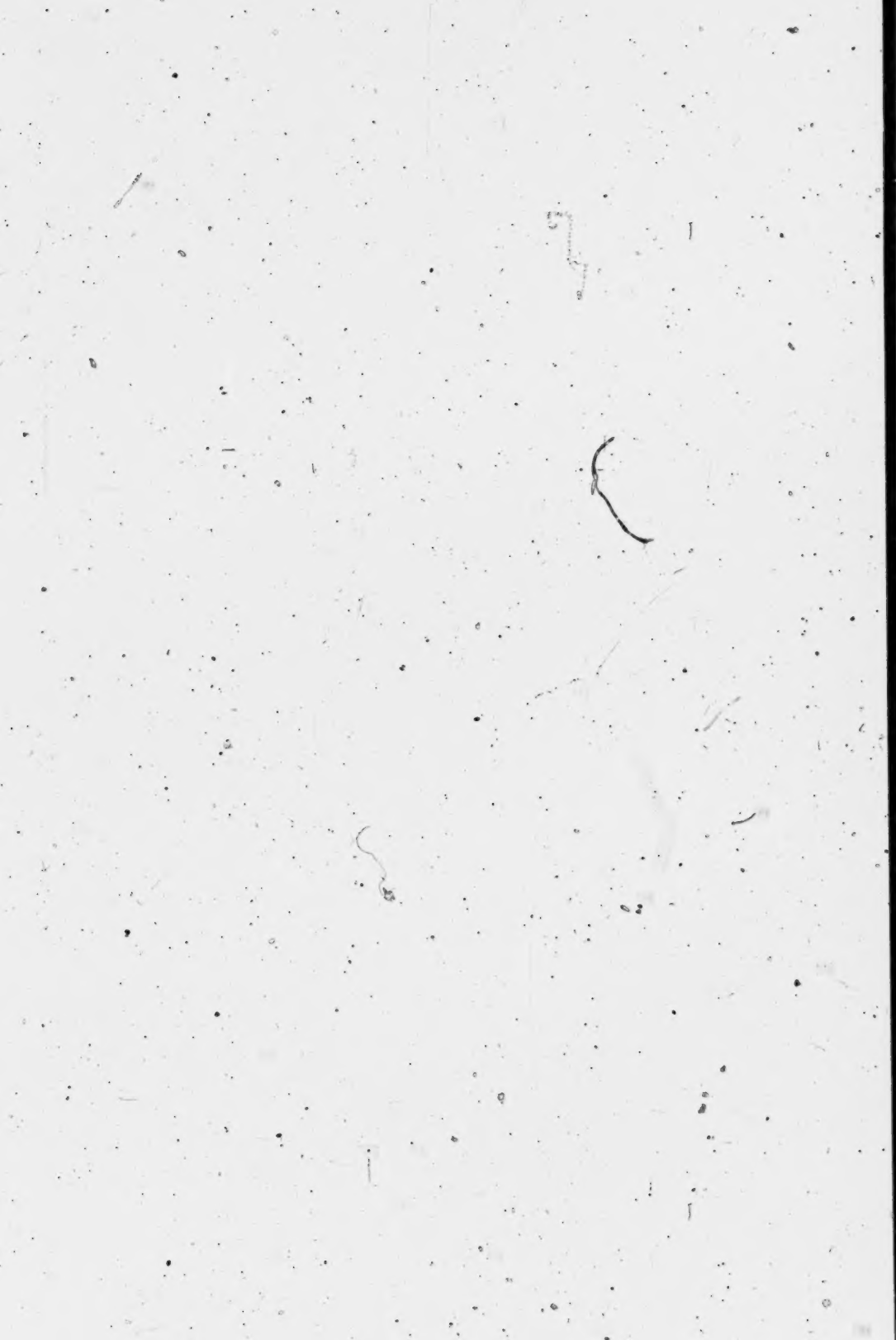
The Commission's formula is set out in full as a part of Exhibit 10 (R. p. 108-109). A detailed explanation of the manner in which it was prepared and applied, when read in the light of the testimony of the Commission's witness Dickerson (R. p. 32 *et seq.*), appears as Appendix A of this Reply Brief.

The manifest fallacy in the Commission's computation results from the fact that it erroneously sought to determine the amount of Appellant's *gross* income from the interstate commerce which it conducted over the six railroads and five airlines in Virginia by applying to the amount which it had determined Appellant had actually paid them for express privileges on a mileage basis, the *ratio* which Appellant's *total system gross receipts bore to the total amount it had*

paid all railroad companies for express privileges, namely, 2.824. There was no evidence whatever to support the assumption upon which the Commission's formula was based that the *ratio* of Appellant's Virginia total gross receipts from express matter carried on only six railroads and five airlines to the amount actually paid such Virginia railroads was the same as the ratio which Appellant's gross receipts from *all* its business bore to the amount paid to *all* railroads over which it transported express matter. *Unless these ratios were the same this essential factor in the Commission's formula is unsupported by proof or even by reasonable assumption.* There was no such evidence, and it is respectfully submitted that none such exists. The amounts shown in Column D of the Formula (Appendix "A") aggregating the total of \$6,499,519, which the Commission found to be the amount of gross receipts that Appellant derived from its interstate business in Virginia, are therefore clearly erroneous, are unsupported by any reasonably accurate computation and constitute no valid basis for the assessment.

Appellee also contends that under the prior statute interstate gross receipts "were presumptively determined by a formula based on proportion between mileage in Virginia and total system mileage", while, under Section 58-547 as amended, such receipts are described as those "derived from operations within this State", and that it was only because of Appellant's failure to report gross earnings from its operations within this State that the Commission exercised the authority conferred upon it by Section 58-549 by determining such receipts from "the best and most reliable information that it can procure". Whether the present statute authorizes such an apportionment on a mileage basis or not seems immaterial since the formula employed by the Commission in determining Appellant's gross receipts in Vir-







ginia was admittedly prepared on a mileage apportionment basis and would seem consistent with the intent of Section 58-547 as presently enacted since that section provides that, if a corporation's operations "are partly within and partly without this State", then its gross receipts from operations within the State shall be determined "from the transportation within this State of express transported through, into and out of this State." Obviously the Commission could have made no such determination without, as it in fact did, applying what it considered to be an appropriate mileage formula. As previously pointed out, the formula actually employed by the Commission did not adhere to the proportionate mileage basis properly and commonly employed in such cases.

Appellee asserts in this connection that Appellant's contentions (1) that it had no property in Virginia on which a tax could be levied in an amount sufficient to support this "in lieu" tax and (2) that the going concern value attributed to its property is so disproportionate as to "overtax our credulity" are "based upon the assumption of a *false* tax rate of one-half of one percent (50¢ on \$100 of value)" since no such tax is imposed upon Appellant's intangible property or money under the present statute (Brief p. 35). It is of course true that no property tax is presently imposed upon Appellant's intangible personal property or money since it would have been a contradiction in terms to say that the franchise tax imposed by Section 58-547 was *in lieu* of a tax on *such* property and at the same time prescribe a rate at which such property was subject to taxation.

The "mathematical" formula employed by Appellant to demonstrate that the tax in question is not in fact a property tax but, if considered as such, is so disproportionate to the value of Appellant's property in Virginia as to be unconstitutional is made necessary by the Commission's failure to

ascertain or determine *what* the value of such property was. Without some knowledge of the value of Appellant's intangible personal property and money, there is no way of determining whether a franchise tax in the "amount" imposed by the Commission was lawfully imposed *in lieu* of a tax upon such property. It could not, under the decision of this Court, be in excess of what would be legitimate as an ordinary tax on the property *in lieu* of which it is imposed (see authorities relied upon in Appellant's Brief p. 25).

The rate of 50¢ on the \$100 of value was imposed on Appellant's intangible property and money prior to the 1956 amendment to Article 4 of Chapter 12 of the Code of Virginia (see Section 58-546). Similar taxes were and still are imposed on railroads and other public service corporations (see Sections 58-516, 58-517, etc.). In this situation Appellant sought to demonstrate, and we respectfully submit successfully demonstrated by the "mathematical" computation of which Appellee complains, that in order for its intangible personal property (including good will or going concern value) in Virginia to justify a tax of \$139,739.66 as imposed by the Commission, its property of this kind would have to have a value (if taxed at the old rate of 50¢ on the \$100 of value) of \$27,947,932. Appellant contends that its tangible property in Virginia having a total value of \$475,665, as well as its intangible personal property including the value of its contracts with the railroads over which it transports express matter, can obviously have no such good will or going concern value, although if taxed at the rate previously applied by the statute to *such* property, *and in lieu of which the present franchise tax is imposed*, the Commission would have had to find that Appellant's property of this nature had a valuation of \$27,947,932.

Appellee refers in this connection to the decision of the Virginia Court in which it is stated that:

“There is no evidence in the record as to the relation between the Company’s property and its revenues in other states. Code Sections 58-672 and 58-1122 provide ample means for correcting excessive assessments.” (Brief p. 34)

This statement is wholly inconsistent with the record. Appellant did just what the Virginia Court pointed out it should have done, namely, petition the Commission for a correction of its assessment and a refund of the tax, as provided in Section 58-672 of the Code. The very first paragraph of its petition recites that it “respectfully presents this petition pursuant to the provisions of Section 58-547 of the Code of Virginia (1950)” and then alleges the facts upon which it based its application for relief (R. p. 1 *et seq.*). The prayer of the petition was for the correction of the assessment and a refund of the tax (R. p. 5). At the hearing oral testimony was introduced and voluminous exhibits filed showing the “relation between the Company’s property and its revenues in other states”, as suggested by the Virginia Court, all of which were relied upon before the Commission in support of Appellant’s contention that the tax was a burden on interstate commerce and, if considered to be a property tax, was unconstitutional in that it deprived Appellant of its property without due process of law (R. pp. 4-5). It is difficult to understand, therefore, how Appellant could have done more in an effort to seek correction of the tax than it did do in conformity with the Virginia statutes to which the Court refers.

Throughout Appellee’s brief it is repeatedly asserted that Appellant’s ownership of the Virginia Company is of great value to it since it is enabled through that company to transact an intrastate business in Virginia and receive all of the

revenue which the Virginia Company receives directly from the transaction of such intrastate business. The implication of these assertions does not conform to the terms of the agreement between the two companies which provides in this respect that:

"The revenues on intrastate business in Virginia shall accrue to the Virginia Company as shall also any other revenues which shall be earned by it or which it shall be mutually agreed shall be included in its revenue accounts. The Virginia Company shall assume all operating expenses *and taxes* incident to earning its revenues. *Any excess* of revenues over expenses, *taxes*, and other costs, of or chargeable to the Virginia Company as provided herein, shall be credited to the Delaware Company, in consideration of which the Delaware Company shall protect and save harmless the Virginia Company from any further payments for the transportation of the express matter of the Virginia Company over the railroad and other transportation lines in Virginia and for the use by the Virginia Company of the real property and equipment of the Delaware Company as herein provided for." (R. p. 102)

From the foregoing it is manifest that Appellant derives no financial advantage from its ownership of the Virginia Company which can be said to augment or increase the value of its *interstate* business since, under its "Standard Express Operations Agreement" with the railroads (Ex. No. 1 with the original Record), it is required to pay them for their services in transporting its express matter *all* of its income after operating expenses and other deductions allowable under the Internal Revenue laws (R. p. 6), thus leaving it no opportunity to retain, or profit by, *any* revenue which it may have received from the Virginia Company un-



der the foregoing provisions of the agreement between them.

The great value which the Commission and the Virginia Court attributed to these "express privilege" contracts is, therefore, shown to be non-existent since Appellant is prevented from profiting (in the sense that it derives net income) by its operation under them. It is the railroads of Virginia which derive *all* of the revenue of Appellant over and above its operating costs, etc., and the revenue thus received by them is taxable as a part of their gross receipts under the provisions of Section 58-519 of the Code.

Moreover, the Virginia Company was assessed with and paid all property taxes imposed upon it by the State, as well as a franchise tax pursuant to Section 58-547 based on gross receipts derived from its intrastate business (R. pp. 16, 92). If therefore, as contended by Appellee, Appellant should be taxed "as though" it did an intrastate business in Virginia, it is manifest that the State has received *all* of the property taxes *as well as a franchise tax* upon the gross receipts which Appellant may incorrectly be urged to have derived from the transaction of such intrastate business in this State through its ownership of the Virginia Company.

## CONCLUSION

For the reasons heretofore stated and those more fully presented and discussed in Appellant's opening brief, it is respectfully submitted that the judgment and order of the Virginia State Corporation Commission assessing Appellant with the franchise tax in the amount of \$139,739.66 for 1956 and the decision of the Supreme Court of Appeals of Virginia affirming such assessment should be reversed, the

assessment corrected and expunged from the assessment rolls, and the amount of the tax refunded to Appellant.

October 10, 1958

RAILWAY EXPRESS AGENCY,  
INCORPORATED

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# **APPENDIX A**

Explanation of formula employed by the Commission in determining gross receipts derived by Appellant from the transportation of express through, into and out of the State of Virginia pursuant to Section 58-547 of the Code.

The Commission:

(a) Ascertained from Appellant's report to it the amounts paid by Appellant to such six railroads and five airlines for express privileges (Column A of Statement);

(b) Having ascertained the "percentage of mileage in Virginia" of these railroads and airlines to their system mileage (Column B of the Statement) the Commission multiplied the amounts shown in Column A by the Virginia mileage of such lines and *thus* ascertained what *it* considered to be the amounts paid by appellant to such railroads and airlines for the transportation of express matter in Virginia in interstate commerce (Column C of Statement).

(c) Since the amounts shown in Column A represented amounts paid such carriers under the "Standard Express Operations Agreement" (Exhibit No. 1, Appendix p. 1) *after all of Appellant's operating expenses, depreciation charges, etc., had been paid*, it was necessary for the Commission in some manner to determine what Appellant's *gross* income had been from the express business conducted on such six railroads and five airlines in Virginia.\* This it undertook to do by ascertaining the *ratio* of Appellant's total gross receipts to the total amount paid to all railroads

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\* Appellant's operating expenses include no part of the operating cost of the several railroads over the lines of which express matter is transported, pursuant to the terms of the "Standard Express Operations Agreement". The amount paid the railroads by Appellant is in compensation for this service and is what is referred to in Appellee's brief as "express privileges".



over which it operated in the United States (\$344,391,154 and \$121,951,105, respectively) which it determined to be 2.824 (Record p. 108).

(d) The Commission then multiplied the amount which it had determined to be the income received by each of the six railroads and five airlines from Appellant on account of express matter transported in interstate commerce *in Virginia* by 2.824, and thus determined what it considered to be the *gross* income which Appellant derived from the interstate commerce which it transacted over the lines of such six railroads and five airlines in Virginia, namely, \$6,499,519 (Appendix p. 25).

FILED

MAR 25 1958

JOHN T. FEY, Clerk

In the  
**Supreme Court of the United States**  
October Term 1958

No. ~~330~~ 38

RAILWAY EXPRESS AGENCY,  
INCORPORATED,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

Appeal from the Supreme Court of Appeals of Virginia

**MOTION TO DISMISS**

and

**BRIEF OF APPELLEE IN SUPPORT OF THE  
MOTION TO DISMISS**

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**In the  
Supreme Court of the United States**

**October Term 1957**

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No. ....

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**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant,*

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**COMMONWEALTH OF VIRGINIA,**

*Appellee.*

---

**Appeal from the Supreme Court of Appeals of Virginia**

---

**MOTION TO DISMISS**

**and**

**BRIEF OF APPELLEE IN SUPPORT OF THE  
MOTION TO DISMISS**

---

**MOTION TO DISMISS**

The Commonwealth of Virginia respectfully moves that the Court dismiss the appeal in the above entitled case on the ground that neither of the questions involved presents a

substantial federal question, and that the judgment on the second question rests on an adequate non-federal basis.

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## BRIEF OF APPELLEE IN SUPPORT OF THE MOTION TO DISMISS

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by this appeal, files this statement in opposition to the appellant's Statement as to Jurisdiction, and includes herein its brief in support of the Motion to Dismiss the appeal.

### I.

## THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

### A.

#### The Statute

The appellant contends that Section 58-546 and Section 58-547 of the Code of Virginia, which authorize the levying of a franchise tax on express companies in lieu of taxes upon all other intangible property, and in lieu of property taxes on rolling stock of such companies, are invalid under the Commerce Clause of the Constitution of the United States. These sections are found in Article 4 of Chapter 12, Title 58 of the Code of Virginia. Other sections are important to a consideration of this matter and the whole of Article 4, Chapter 12, Title 58 of the Code of Virginia, as amended, is printed as an appendix to the Statement as to Jurisdiction, but for the convenience of the Court, § 58-546 and § 58-547 are as follows:

“§ 58-546. Franchise tax on express companies.— Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

"§ 58-547. Amount of franchise tax. — The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

## B.

### The Proceedings Below

The case involves an application of the Railway Express Agency, Incorporated, a Delaware corporation, hereinafter referred to as "appellant", as distinguished from the Railway Express Agency, Incorporated, of Virginia, which is referred to herein as the "Virginia Company". This application was for the correction of the assessment of taxes for the year 1956 made by the State Corporation Commission of Virginia in accordance with §§ 58-546 and 58-547, *et seq.*, of the Code of Virginia, and for refund of such taxes. The State Corporation Commission denied the refund by order entered on March 1, 1957, and from that order the appellant appealed as a matter of right to the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia, by order and opinion dated December 2, 1957, and reported in 199 Va. 589, held that the tax in question is a property tax not prohibited by the Commerce Clause or any other clause of the Constitution of the United States, and validly imposed by the aforesaid amended sections of the Virginia Code.



## C.

### Statement of the Case

The appellee believes that the Statement of the Case included in the Statement as to Jurisdiction requires amplification, and that in several respects it is in error.

By way of amplification, it is important to note that the evidence in this case reveals without contradiction that, even though the appellant may not be *directly* engaged in intrastate commerce in Virginia, *the property owned by it in Virginia is used in intrastate commerce in Virginia, and for that use the appellant receives valuable consideration.* Further, it appears that the appellant has a contract with the Virginia Company, under the terms of which the Virginia Company is required to conduct the intrastate express transportation business in Virginia on the lines of fifteen (15) railroads, one (1) electric line, one (1) boat line and by motor vehicle as designated by appellant, and the *Virginia Company is obligated to perform the obligations of the appellant imposed by contracts between the appellant and such carriers concerning intrastate operations in Virginia.* The contract further provides that the appellant *shall furnish to the Virginia Company, or permit the use jointly with it by the Virginia Company, of such property, real and personal, as may be necessary in the conduct of business transacted by the Virginia Company.* The employees of the two companies are considered joint employees whenever necessary for the conduct of the business of the parties in Virginia. All revenue received by the Virginia Company is required to be transmitted to the appellant.

It is true that there appears in the Record a stipulation entered into prior to the hearing before the State Corporation Commission. It is to the effect that the appellant conducts only an interstate business in Virginia.

However, it should be noted that the appellant's evidence before the Commission reveals that the appellant has contracts with railroad companies giving it "exclusive express privileges", that the appellant has in turn contracted with Railway Express Agency, Incorporated, of Virginia, and under terms of the contract has, in effect, assigned to the Virginia Company its intrastate privileges in Virginia, the two companies use the same facilities, the same equipment, the same supplies, even the same bills of lading. The employees are "joint employees", and the Virginia Company transmits to the Delaware Company all its receipts. The Delaware Company pays or bears all costs or expenses, including all operating expenses of the Virginia Company. In other words, the appellant totally owns the Virginia Company, receives all its revenues and pays all its bills, and permits the Virginia Company to use the appellant's property in Virginia in intrastate commerce.

The following statements are by way of correction of the appellant's Statement of the Case.

The appellant states (p. 4) that prior to 1956 the Code of Virginia "\* \* \* imposed an annual *license* tax on express companies *for the privilege of doing business* \* \* \*". Further (p. 5), it says that the statute was amended and re-enacted in 1956, and that the effect of the amendment "was to change the name but not the incidence of the tax". The Virginia Court found it to be a "different" tax, and so it is.

The 1956 amendments to the Virginia statute were vastly more than a change in the name of the statute. This Court had held in 347 U. S. 359 (1954) that the statutes then in force imposed a license tax for the privilege of doing solely an interstate business. Consistent with that determination, Virginia assessed no such taxes against the appellant in 1954 or 1955. In 1956, the Legislature, confronted with the fact that the existing license tax for the privilege of doing

business had been nullified as to this company, changed the nature of the tax and imposed a franchise tax on all express companies doing business in the State *in lieu of taxes upon all their other* intangible property, and in lieu of property taxes on their rolling stock. The tax was not called, and does not operate as, a license tax. The incidence of the tax is the increased value of the appellant's property as a going concern. The tax is not said to be, and does not operate as, a tax for the privilege of doing business in Virginia.

The appellant asserts that the manner in which the tax was determined denies it equal protection and due process of law. How was the tax determined? The appellant, in its 1956 return, reported, as to its receipts earned from business passing through, into or out of the State, that it had "NONE" and explained on the return that it had no way of determining such. As a result of this report, the State Corporation Commission of Virginia, acting under the statutory method provided, proceeded to determine the tax based on the "best and most reliable information" available (§58-549, Code of Virginia). The Record is devoid of any evidence as to the complexity or cost which would have been involved had the appellant chosen to keep the necessary records to supply the information required of it.

The statutory method of determining the tax was only used because appellant failed to report.

Appellant uses several involved mathematical comparisons in an attempt to show that the tax reaches property outside of the State of Virginia. On page 8 of the Statement as to Jurisdiction, it is said that it appears from the appellant's 1956 return that as to certain named classes of property it owned a total property value in Virginia on the taxable date of \$458,565.16, and that from the same return the depreciated nationwide system values of the same classes

of company property were \$79,700,426. Two comments are required:

(1) One of the classes listed is intangible personal property. The only value attributed to Virginia ownership in that category is \$120,110.70 for money on deposit. NO VALUE IS ATTRIBUTED TO THE EXISTING CONTRACT WITH 177 RAILROADS BY WHICH THE APPELLANT OWNS THE EXCLUSIVE EXPRESS PRIVILEGES OVER SAID ROADS NATIONWIDE, INCLUDING LINES OPERATING IN VIRGINIA. Further, NO VALUE IS ATTRIBUTED TO TOTAL OWNERSHIP OF THE VIRGINIA COMPANY, NOR TO THE CONTRACT WITH THE VIRGINIA COMPANY PREVIOUSLY REFERRED TO HEREIN.

(2) The figure of \$79,700,426 (nationwide system values) includes values for a class of property other than the classes listed for Virginia, and if limited to classes similar to those listed for Virginia would be reduced by \$15,394,946.

## II. ARGUMENT

### A.

**The Tax Involved Is a Property Tax and No Substantial  
Federal Question Is Presented**

#### 1.

JUDICIAL INTERPRETATION OF THE TAX IN VIRGINIA

The constitutional and statutory provisions of the Commonwealth furnish a uniform plan for the assessment and



taxation of all public service corporations, providing first for the imposition of *ad valorem* taxes on tangible property by local authorities on the basis of valuation fixed by the State Corporation Commission. In making the assessment of the tangible property for local taxation, the Commission must and does *exclude* such franchise or going concern value as may be inherent in such property, and, as a result, the localities tax only the "bare bones" value, leaving, for the second part of the system, the intangible "going concern" value to be taxed by the State for the protection and services rendered by it.

The Supreme Court of Appeals of Virginia has found that "the statutes now under consideration fit into and 'mesh' with that scheme", and that the tax is in fact and effect a tax on intangible property which has great value and would otherwise be untaxed.

That this was the purpose and intent of the framers of the Virginia Constitution of 1902 is clear. (See, Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857, or for excerpt therefrom see the opinion in this case of the Court below, 199 Va. 589, 597.)

It is also clear that the present holding of the Supreme Court of Appeals of Virginia is not for the purpose of classifying a tax to avoid rulings of this Court. In the case of *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, the majority opinion acknowledged the fact that the Virginia Court's determination that the tax involved was a property tax was consistent with its earlier decisions, and the minority opinion expressly called attention to the fact that it was consistent with the earlier holdings of both the State Supreme Court and the State Corporation Commission, and that some of those decisions antedated *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. Ed.

573, 71 S. Ct. 508. (*Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, at pages 364 and 371.) See also *City of Richmond v. Commonwealth*, 188 Va. 600, 50 S. E. 2d 654 (1948); and *Commonwealth v. Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137.

The decision of the Court below in this case and the earlier Virginia decisions make it clear that:

(1) The tax is a property tax "in lieu" of taxes on other property.

(2) The "going concern value" of the corporation's property is not otherwise taxed in Virginia.

(3) The "going concern value" is not subjected to dual taxation for the tax is measured by fairly apportioned gross receipts.

## 2.

### ADMINISTRATIVE INTERPRETATION IN VIRGINIA

The State Corporation Commission of Virginia has consistently administered the taxation of public service corporations in Virginia, including express companies, in such a manner that the physical properties are taxed by the localities as bare bones of the property, denuded of the intangible elements of value which may be attributed to them. The intangible or going concern value is treated as, and spoken of as, franchise value, and is only reached by the franchise tax measured by gross receipts. (See statement of former State Corporation Commissioner Epes quoted in *Commonwealth v. Baltimore Steam Packet Co.*, *supra*; and see 1941 Annual Report of the State Corporation Commission as quoted in part in the *Baltimore Steam Packet Case*, 193 Va. 55, at page 70.)

## THE STATUTE

In the prior case between these same parties (347 U. S. 359), this Court was divided five (5) to four (4). The majority opinion held that the Court would examine for itself the practical operation of the tax and said:

"We start with the taxing statute in which the Legislature gave a trinity of characterizations to the tax. It was declared to be in addition to the 'property tax', not an additional property tax; it was named 'an annual license tax', and it was laid 'for the privilege of doing business in this State.' It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was taxing." (347 U. S. 364)

In conclusion, the Court said:

"We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business." (347 U. S. 369)

In the dissenting opinion, it was made clear that the majority had based their decision mainly, if not solely, on the labels which the Virginia Legislature had applied. There it is said:

"In sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legislature gave it. Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld. The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval." (347 U. S. 372)

The present taxing statute (§ 58-546) reads as follows:

"Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a *franchise tax* which shall be in lieu of taxes upon all of its *other intangible property* and *in lieu of property taxes* on its rolling stock." (Emphasis added)

The word "other" leaves no room for doubt as to what is being taxed—property! Because under the decision of this Court, it was clear that the Legislature had "misconceived what it was taxing", the Legislature reconsidered what it was taxing and clearly levied a property tax. The "trinity" of characterizations no longer exists and the intention of the Legislature, to levy a property tax in lieu of taxes on other property, becomes manifest.

The tax is not made a condition precedent to the right to carry on business, but its enforcement is left to the ordinary means devised for the collection of taxes, demonstrating that it is not a license or privilege tax. (*Postal Tele. Cable Co. v. Adams*, 155 U. S. 688.)

As was said in the dissenting opinion in the prior case (347 U. S. 359, at page 369):

"The tax in question is nondiscriminatory, fairly apportioned, and not excessive."

## B.

### The Appellant's Virginia Activities

The evidence reveals that the appellant permits its property to be used in intrastate commerce in Virginia by its wholly owned subsidiary, and for that use it receives all of its subsidiary's receipts. In addition, it is clear that it, and its subsidiary, use the same facilities, the same equipment,



the same supplies, even the same bills of lading. The employees are "joint employees". The appellant pays or bears all costs or expenses including all operating expenses of the Virginia Company. In other words, the appellant totally owns the Virginia Company, receives all its revenues and pays all its bills. Certainly, it is clear that the Virginia Company is merely a corporate shell admittedly created to satisfy Section 163 of the Constitution of Virginia. These facts were not considered by this Court in the prior case, and distinguish this case from the prior decision. The use of its property intrastate in Virginia clearly provides a basis for the Virginia tax against the appellant.

### C.

#### The Amount of the Tax

##### 1.

#### THE METHOD OF DETERMINING THE TAX

Appellant contends that it "had no way of determining and was, therefore, unable to report for taxation the amount of its gross receipts earned 'in business passing through, into or out of' Virginia, as required by § 58-547." In spite of the fact that appellant insists that it has no way of determining what is correct, it strenuously maintains that the assessment against it is incorrect.

This contention would seem to answer itself, for, if the appellant has *no way* of determining the correct answer, obviously it has no way of proving the Virginia assessment to be incorrect. However, there are other answers to this contention, as the Supreme Court of Appeals of Virginia said in its opinion in this case:

"Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross re-

ceipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. \* \* \*

\* \* \* For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The Commission thereupon ascertained in the best way it could the amount of these gross receipts to be \$6,499,519. *If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility of an agreement about it as in prior years (Railway Express Agency, Inc., v. Commonwealth, 194 Va. 757, 75 S. E. 2d 61).*

*"There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as prima facie correct, Constitution § 156(f). It is not incredible that a prop-*

*erty which produced gross earnings of \$6,000,000 in one year would have a value of that much."* (Emphasis added)

The failure of the appellant to produce evidence in the State tribunals to support its claim is sufficient reason for this Court to deny a review of the State decision.

In spite of its failure to produce any evidence to support its claim, the appellant seeks to argue before this Court that the Virginia assessment is "unrealistic" because 1.7% of its total gross revenues is attributed to Virginia, whereas it says that there is located in Virginia only about 0.6% of its total assets of like class as those located in Virginia. The appellant's mathematics appear to be greatly in error, and, indeed, at pages 8 and 18 of the Statement as to Jurisdiction, it contradicts itself. On page 8, it lists the various classes of property owned by it in Virginia as totaling \$458,565.16 as compared with a nationwide system value of the same classes of property of \$79,700,426. On page 18, while using the same nationwide system value, the "like" Virginia located property has grown to \$475,665.00 (a discrepancy of over \$17,000, or a little over 3%). More important, however, is the fact that neither of the figures shown for the value of property located in Virginia includes any value for the ownership of the Virginia Company. Obviously, this omission will greatly distort the statistics.

The fallacy in appellant's statistical approach is immediately apparent. In Virginia, appellant enjoys the joint use of property with the so-called Virginia Company. With regard to its property located in Virginia, by merely placing title to all its tangible personal property, office furniture, equipment and real estate in the Virginia Company—which it wholly owns and controls—the appellant could realize the same earnings in Virginia and have an even smaller per-

centage of its total property Virginia owned. One big asset of the appellant is the Virginia Company. The joint use of trucks, buildings, employees, etc., makes it easy for appellant to earn tremendous sums in Virginia without the ownership of property.

The claim that 1.7% of its revenues was derived in Virginia the appellant brands as "unrealistic", but the evidence showed that the total mileage covered by the appellant, by rail, steamboat, motor carrier or miscellaneous was 306,624, and that 6,118.90 miles of that is in Virginia. Over 1.9% of its total mileage is in Virginia. How can it be unrealistic to say that 1.7% of its revenue was derived in Virginia? — Express companies make money on the basis of the mileage involved, not on the basis of the value of the tangible property owned, and the contract right to move express over these 6,118.90 miles is valuable property, especially so when over most of the mileage the appellant enjoys an absolute monopoly.

Appellant further sought to demonstrate mathematically that the going concern value attributed to its properties is so disproportionate as to "over-tax our credulity". It does so by the simple device of assuming for purpose of computing going concern value a false tax rate of  $\frac{1}{2}$  of 1% (50¢ on \$100.00 in value).

This is extremely misleading BECAUSE THE INTANGIBLE PROPERTY OF THE APPELLANT IS NOT TAXED AT THE RATE OF  $\frac{1}{2}$  of 1%. The Legislature of Virginia has seen fit to tax the intangible value of express companies at a rate of 2.15%. It is obvious that the value required to result in the amount of tax involved here will be \$6,499,519 (the gross receipts).

$$\text{Value} \times \text{Tax Rate} = \text{Tax}$$

or

$$\text{Tax} \div \text{Tax Rate} = \text{Value}$$



The Legislature has merely measured value by gross receipts and the use by appellant of a tax rate less than  $\frac{1}{4}$  as great as the applicable rate will obviously reflect a value more than four times as great as the value determined by the legislative procedure.

The appellant uses this same erroneously determined value of \$28,000,000.00 to argue that it has no property "in lieu" of which this assessment could be made.

There is one item of intangible personal property about which the appellant has said very little in this case. It appears from the record that the appellant *owns* a contract which entitles it to the exclusive express privilege on 177 railroads in the United States and express privileges on a number of truck lines, air lines and steamboat lines. Many of them operate in Virginia. What is the value of this "intangible" property?

This we do not know. We do know that based on the proportion of Virginia mileage to system mileage the privilege on the six major railroads and five air lines, earned gross revenues in Virginia of \$6,499,519 in one year. The Legislature has concluded that only by determination of revenues can we reach the value of such a corporation's property. We must assume that in fixing the rate of tax the Legislature was well aware that it was levying a tax to be measured by gross receipts rather than net income, and that it set the tax rate much lower than would have been the case if they had been basing the tax on net income.

The ownership by the appellant of these exclusive contract rights with various carriers in Virginia could be made the subject of a contract tax in Virginia. However, Virginia in the exercise of its discretion has determined to impose a franchise tax measured by gross receipts "in lieu" of such

a tax on this and other intangible property and on rolling stock. This action of the General Assembly has been found by the State Corporation Commission and the Supreme Court of Appeals as being consistent with the intent and purpose of the State Constitution, and further both of these judicial bodies have found the operation of the tax inoffensive under the Constitution of the United States.

### III.

### CONCLUSION

For the foregoing reasons, the appellee respectfully submits that the question upon which the decision of this case depends is so unsubstantial as not to need further argument, and the appellee respectfully moves the Court, therefore, to dismiss the appeal.

Respectfully submitted,

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In the  
**Supreme Court of the United States**  
October Term, 1958

No. 38

**RAILWAY EXPRESS AGENCY,  
INCORPORATED,**

*Appellant*

v.

**COMMONWEALTH OF VIRGINIA,**

*Appellee*

**Appeal from the Supreme Court of Appeals of Virginia**

**BRIEF FOR THE APPELLEE**

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RAILWAY EXPRESS AGENCY,  
INCORPORATED,

*Appellant*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee*

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Appeal from the Supreme Court of Appeals of Virginia

---

**BRIEF FOR THE APPELLEE**

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## **OPINIONS BELOW**

The opinion of the Supreme Court of Appeals of Virginia in this case is officially reported in Volume 199 of the Virginia Reports at page 589, and is also reported in Volume 100 of the Southeastern Reporter, 2nd Series, page 263. The opinion of the State Corporation Commission of Virginia has not yet been officially reported, but the text of the

opinion is printed commencing on page 43 of the printed transcript of record.

## GROUND OF JURISDICTION

The Appellant challenges the validity of Sections 58-546 and 58-547 of the Code of Virginia, 1950, as amended, alleging them to be repugnant to the Commerce Clause of the Federal Constitution, and further seeks to challenge the amount of the tax as repugnant to the Fourteenth Amendment. The appeal is pursuant to Section 1257(2) of Title 28 of the United States Code.

## QUESTIONS PRESENTED

By this appeal the following questions are presented:

- (1) Is the tax involved a property tax measured by apportioned gross receipts and levied in lieu of taxes upon other property?
- (2) Are the Appellant's Virginia activities such as would justify the tax regardless of its nature?
- (3) Having failed or refused to report its earnings attributable to Virginia, can the Appellant, in this Court, contest the amount of the State's assessment made on the best and most reliable information available?
- (4) Having failed to produce evidence in the State tribunals to support its claim that the tax is excessive, can the Appellant be heard to complain in this Court?
- (5) If the Appellant is to be heard in this Court on the amount of the tax the further question occurs, is the tax excessive?

## STATEMENT OF THE CASE

### A.

#### Preliminary Statement

The case is an appeal from the judgment of the Supreme Court of Appeals of Virginia affirming an order of the State Corporation Commission entered March 1, 1957, which order denied to the Appellant refund of certain taxes for the year 1956. The tax in question was assessed by the State Corporation Commission under the provisions of Article 4 of Chapter 12 of Title 58 of the Code of Virginia, 1950, as amended.

### B.

#### The Case

The Appellee believes that the Statement of the Case included in Appellant's brief requires amplification in some respects.

By way of amplification, it is important to note that the evidence in this case reveals without contradiction that, even though the Appellant may not be *directly* engaged in intrastate commerce in Virginia, *the property owned by it in Virginia is used in intrastate commerce in Virginia, and for that use the Appellant receives valuable consideration*. Further, it appears that the Appellant has a contract with the Virginia Company, under the terms of which the Virginia Company is required to conduct the intrastate express transportation business in Virginia on the lines of fifteen (15) railroads, one (1) electric line, one (1) boat line and by motor vehicle as designated by Appellant, and the *Virginia Company is obligated to perform the obligations of the Appellant imposed by contracts between the Appellant and*

*such carriers concerning intrastate operations in Virginia. The contract further provides that the Appellant shall furnish to the Virginia Company, or permit the use jointly with it by the Virginia Company, of such property, real and personal, as may be necessary in the conduct of business transacted by the Virginia Company. The employees of the two companies are considered joint employees whenever necessary for the conduct of the business of the parties in Virginia. All revenue received by the Virginia Company is required to be transmitted to the Appellant.*

It is true that there appears in the Record a stipulation entered into prior to the hearing before the State Corporation Commission. It is to the effect that the Appellant conducts only an interstate business in Virginia.

However, it should be noted that the Appellant's evidence before the Commission reveals that the Appellant has contracts with railroad companies giving it "exclusive express privileges", that the Appellant has in turn contracted with Railway Express Agency, Incorporated, of Virginia, and under terms of the contract has, in effect, assigned to the Virginia Company its intrastate privileges in Virginia. The two companies use the same facilities, the same equipment, the same supplies, even the same bills of lading. The employees are "joint employees", and the Virginia Company transmits to the Delaware Company all its receipts. The Delaware Company pays or bears all costs or expenses, including all operating expenses of the Virginia Company. In other words, the Appellant totally owns the Virginia Company, receives all its revenues and pays all its bills, and permits the Virginia Company to use the Appellant's property in Virginia in intrastate commerce.

The stipulation does not alter the fact that *property* owned by the Appellant is used in intrastate commerce in Virginia.



Appellant states at page 7 of its brief that the "Virginia Company has paid all taxes (privilege and property) assessed against it since 1932, and there is no question here concerning *any* tax levied against that company" (R. 16, 92)". This fact seems immaterial to a decision here but the evidence offered on this point, as to years other than 1956, was rejected by the State Corporation Commission (R. 21) and its action in so rejecting was sustained by the highest State Court (199 Va. 589 at page 603).

Following the decision of this Court on the prior appeal between the parties the "license" tax provided for under the statutes then in force was not again assessed against the Appellant. In 1956 the General Assembly of Virginia "amended and re-enacted" the statutes affected. The amendments were substantial.

At page 8 of its brief Appellant discusses these amendments to the taxing statute and states "The taxes are identical in all material respects." It says further "The two taxes differ only in that (i) they have different names, (ii) the 'franchise tax' is *in lieu* of, rather than in addition to, certain other state property taxes, and (iii) the 'franchise tax' is not *expressly stated* to be for the privilege of doing business in Virginia." We assert that the two taxes differ in other respects and that the "difference" lettered (ii) by the Appellant is incorrectly described.

A comparison of the material statutes in force in Virginia at the time of the prior appeal (see Appendix B of Brief for the Appellant) and the currently existing statutes (see Appendix A of Brief for the Appellant) will immediately reveal two additional significant changes, both of which are material to a consideration of this case because of contentions made by the Appellant in its brief.

The first of these changes is the fact that under Section

58-546 of the prior statutes there were levied against express companies:

(1) State tax on intangible personal property at the rate of 50¢ on every \$100.00; and

(2) A state tax on money at the rate of 20¢ on every \$100.00.

Under Section 58-546 of the present statutes, the franchise tax is expressly declared to be "in lieu of taxes upon all of its other intangible property". Thus, these two specific taxes were removed by the amendments. The Appellant avoids specific reference to this in enumerating the differences in the two laws and, more importantly, makes a lengthy argument as to the amount of the tax using "Virginia's intangible personal property rate of 50¢ for each \$100.00 of value" as a part of its formula for computations. The Court followed that line of reasoning in its opinion in the prior case for then there was such a rate applicable to express companies. Under the existing statutes there is no 50¢ per \$100.00 of value rate on the intangible property of express companies, and the Appellant's whole argument predicated thereon is, therefore, predicated on a false premise.

The second major change which the Appellant fails to designate as such appears in the provisions of Section 58-547 of the respective laws. Under the existing statutes the Appellant is called upon to report the amount of its gross receipts derived from operations within the State. Under the prior statutes such receipts were presumptively determined by a formula based on proportion between mileage in Virginia and total system mileage. The formula was removed from the statute and was only applied in this case because the Appellant failed to properly report its gross receipts in Virginia (R. 38) and, in fact, said that it had

"none" and that it "had no way of determining" such receipts. The formula was applied administratively under Section 58-549 as being "the best and most reliable information that it (the Corporation Commission) can procure."

The difference lettered (ii) by the Appellant is far more significant than a reading of the Appellant's description thereof would lead one to believe. In effect, the Appellant says the new "franchise tax" is in lieu of certain *other* state property taxes, whereas the old "license tax" was in addition to certain *other* state property taxes. But, that is incorrect. This Court expressly held the old "license tax" to be a tax in addition to property taxes and not in addition to *other* property taxes. That was one of the "trinity of characterizations" which the Court found so important on the prior appeal. This change, which the Appellant deems so unimportant, is a change in the entire character of the tax.

In making its argument with respect to the "in lieu" provisions of the tax, the Appellant has done so on the basis that its only rolling stock consisted of refrigerator cars with a Virginia value of \$17,102.00 (see Appellant's Brief, pages 10, 22 and 26). However, the Appellant also owned automotive equipment and trucks in Virginia valued at \$262,719.00, which both the State Corporation Commission and the Supreme Court of Appeals of Virginia held to be "rolling stock" under the amendments to Section 58-546. Thus, we see still another "difference" in the statutes.

## OUTLINE OF ARGUMENT

### Part I

The amended statutes clearly levy a property tax. The tax is said to be "a franchise tax which shall be in lieu of taxes upon all its other intangible property and in lieu of property taxes on its rolling stock." The "trinity of char-

acterizations" so important in the prior appeal has been removed. Properly apportioned gross receipts may be used as a measure of the going concern value of the property within a state. This is especially true when, as is the case here, the property is used in *intrastate commerce* under a contract with a wholly owned subsidiary and the owner of the property receives all of the revenue from such use.

The Constitution of Virginia clearly reveals that its framers intended taxes such as the one at bar to be property taxes on going concern value. The taxing statutes are so administered that no other tax reaches going concern value. The prior decisions of the Supreme Court of Appeals of Virginia, some antedating *Spector Motor Service, Inc. v. O'Connor*, are uniformly to the effect that such taxes are property taxes. The tax is clearly not a license tax in operational effect, it is not made a condition precedent to the right to do business, it is a part of a system for taxing all of the property of a corporation in the State, it is fairly apportioned to Virginia mileage, and it is in lieu of taxes on other property.

## Part II

Having failed or refused to report in Virginia its receipts attributable to mileage in Virginia, the Appellant should not be heard to contend that the State acted improperly in using the "best and most reliable information" available in arriving at the proper tax base. The mileage formula was invoked only because Appellant failed to properly report. No evidence was produced in the State Court to support a claim that the amount of tax is excessive, and if the action of the Commission in determining the tax base on the best available information has produced an incorrect result, the Appellant cannot complain in view of its failure to adduce any information as to its receipts in Virginia. The contracts



which Appellant has with the Virginia Company and various carriers are valuable property in lieu of which taxes on gross receipts may be levied. The tax is not excessive, and the statistics used by Appellant are misleading because it assumes a false tax rate and excludes any value for the contract rights.

### Part III

The Appellant has contractual obligations with various carriers under which it is obligated to perform *intrastate* services in Virginia. It meets these obligations through the Virginia Company, its wholly owned subsidiary. It permits the Virginia Company to use the Appellant's property for its intrastate operations, and it in turn uses the Virginia Company's property interstate. The Appellant receives all receipt of the Virginia Company. These activities in the State subject Appellant to both property and privilege taxes in the State and, therefore, should the Court determine the present tax to be a privilege tax it is justified under the peculiar facts of this case.

## ARGUMENT

### I.

**Section 58-546 of the Code of Virginia, 1950, as Amended, Imposes a Property Tax in Lieu of Taxes Upon All Other Intangible Property and in Lieu of Taxes on Rolling Stock.**

### A.

#### THE AMENDED STATUTE

The language of the taxing statute is so brief and concise that it seems appropriate to set it forth at this point.

"§ 58-546. Franchise tax on express companies.— Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

This Court, in April, 1954, in a decision on which the Court was divided 5-4 held that the Virginia statute then in force was "in fact and effect just what the Legislature said it was—a privilege tax, \* \* \*."

In reaching its decision, the majority of the Court said:

"We start with the taxing statute in which the Legislature gave a trinity of characterizations to the tax. It was declared to be in addition to the 'property tax', not an additional property tax; it was named 'an annual license tax', and it was laid 'for the privilege of doing business in this State.' It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was taxing." (347 U. S. 364)

In conclusion, the Court said:

"We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business." (347 U. S. 369)

In the dissenting opinion, it was made clear that the majority had based their decision mainly, if not solely, on the labels which the Virginia Legislature had applied. There it is said:

"In sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legis-

lature gave it. Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld. The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval." (347 U. S. 372)

The State had urged, in brief and in argument, that the tax was a property tax; that decisions of the Virginia Court, some antedating *Spector Motor Co. v. O'Connor*, 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508, had held similar taxes on railroads and steamships to be taxes on the "going concern value" and hence property and not privilege taxes; that the intention of the framers of the Virginia Constitution of 1902, as evidenced by the debates and the language of the document itself, was consistent with a determination that the tax was a property tax; and, finally that, as measured by the criteria established in the decisions of this Court, the operation of the statute was consistent with such a determination. In spite of these arguments, the Court was unwilling to conclude that the Virginia Legislature had "misconceived what it was taxing." At its first session following the decision in the prior appeal, the General Assembly of Virginia gave consideration to this Court's decision. It is apparent from the action of the Legislature that it recognized that the language used by it in the prior act had not, under this Court's interpretation, resulted in the tax which the Legislature had intended—to-wit: a property tax on the going concern value of express companies as authorized by Section 170 of the State Constitution. The Legislature, still endeavoring, as it has consistently, to levy a tax on the going concern value of the express companies, amended the taxing statute in an effort:

(1) To make clear its intention to tax property, not privilege;

(2) To measure the tax by fairly apportioned gross receipts and make it in lieu of *other* property taxes; and

(3) To make it plain that the tax was not for the privilege of doing business.

Naturally, the tax looks somewhat like its predecessor. This is true because the Legislature has never changed its objective. It tried before to levy a property tax consistent with the State system of taxation under the State Constitution, and consistent with decisions of this Court dealing with the applicable provisions of the Federal Constitution. This Court, however, pointed to a "trinity of characterizations" which led the Court to conclude that, in fact, the Legislature had levied a privilege tax, and the Court held that under the language of the statutes they were invalid. Consistent with that determination, Virginia assessed no such taxes against the Appellant in 1954 or 1955. The Legislature, confronted with the fact that the existing license tax for the privilege of doing business had been nullified as to this company, amended the taxing statute and imposed a franchise tax on all express companies doing business in the State *in lieu of taxes upon all their other* intangible property, and in lieu of property taxes on their rolling stock. The tax was not called, and does not operate as, a license tax. The incidence of the tax is intangible property including the increased value of the Appellant's property as a going concern. The tax is not said to be, and does not operate as, a tax for the privilege of doing business in Virginia.

In an obvious attempt to clarify the intent of the Legislature "the trinity of characterizations" was removed:



### 1. The First of the "Trinity"

The amended tax was declared to be "in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock" (Emphasis supplied). This Court found significance in the fact that the former tax was "in addition to the property tax, not an additional property tax". By the same kind of reasoning the word "other" in the amended statute clearly points to this tax as being one on a particular type of intangible property.

As we have previously mentioned, the Appellant, in its brief, twice overlooks the significance of this change. At page 15, it says:

"The second change is that the tax is now levied 'in lieu of', rather than 'in addition to', certain other property taxes."

In stating the case on page 8, the Appellant says:

"The two taxes differ only in that \* \* \* (ii) the 'franchise tax' is *in lieu of*, rather than in addition to, certain other state property taxes."

In both these statements, the Appellant speaks as though the prior statute levied a license tax in addition to *other* property taxes, or was, in other words, an additional property tax. But, that is exactly what this Court said was not true. Great significance was laid by the Court on the fact that it was not an *additional* property tax. Thus, both of the quoted statements of the Appellant miss the entire point of the amendment. Small wonder it considers it the same tax.

## 2. The Second of the "Trinity"

While the tax under the former statute had never operated as a license tax, the term "license tax" was removed.

## 3. The Third of the "Trinity"

Under the former statute, payment of the tax was not a condition precedent to the right to do business, that is likewise true of the amended statute, but in the amended statute the phrase "for the privilege of doing business in this State" has been removed.

The Appellant argued before the Supreme Court of Appeals of Virginia that the tax imposed by the amendments to the Virginia statutes " \* \* \* is the same tax, but under another name, which was held invalid \* \* \*." In reply to this, the Virginia Court said:

"In the present case we are dealing with statutes different from those before the Supreme Court in the former *Railway Express Agency* case. Present § 58-546 imposes only 'a franchise tax which shall be in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock' (emphasis added). Section 58-547 provides that this franchise tax shall be equal to 2.15% of gross receipts derived from operations in this State. Section 58-551 permits the locality to impose a tax on real estate and tangible personal property other than rolling stock on the basis of the assessment thereof made by the Commission for that purpose and at the same rate as imposed by the locality on the same kind of property. Section 58-553 provides that the taxes so imposed and authorized shall be in lieu of all other taxes and of all licenses on such companies, except the motor vehicle license or fuel tax prescribed by law or the annual registration fee.

"As we pointed out in the *Steamship* cases, *supra*, our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of all public service corporations, providing for the imposition by local authorities of *ad valorem* taxes on tangible property on the basis of valuation fixed by the State Corporation Commission, and the imposition of a franchise tax measured by gross receipts for the support of the State government; and that in making the assessments of the tangible property for local taxation, the Commission must *exclude* such franchise value as may be inherent therein, with the result that only the 'bare bones' value of such property is taxed by the localities, leaving the intangible or 'going concern' value to be taxed by the State for the protection and services rendered by it. The statutes now under consideration fit into and 'mesh' with that scheme, and make plain, we think, the legislative intent, in keeping with the constitutional intent from which the legislation proceeded, that the franchise tax now imposed is in fact and effect a tax on intangible property of the company, of great value, which except for this franchise tax would be immune from the payment of any tax." (199 Va. 596)

In the case of *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 62 L. Ed. 827, this court discussed two earlier cases. Both of those cases had been decided on the same day. Consideration of the distinction drawn between the two cases is of tremendous value in weighing the effect of the amendments to the Virginia statutes. There it was said:

"\* \* \* A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer v. Wells, F. & Co.*, 223 U. S. 298, 56 L. Ed. 445, 33 Sup. Ct. Rep. 218, and *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. Rep.

211, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that state. The statute called the tax a 'gross revenue tax,' and declared that it was to be 'in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the state was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state." (246 U. S. 454, 455)



## B.

# PROPERLY APPORTIONED GROSS RECEIPTS MAY BE MADE THE MEASURE OF GOING CONCERN VALUE

The Appellant says that the determining factor in this Court's decision in the prior appeal is the principle that a direct tax on gross receipts does not measure property values, and, therefore, is not a property tax. For this principle the case of *United States Glue Company v. Oak Creek*, 247 U. S. 321, is cited. That case was decided in 1918 and has been referred to in numerous decisions since that date. The case has not been generally cited, however, as authority for the proposition that a properly apportioned gross receipts tax in lieu of other property taxes is unconstitutional. However, on the prior appeal this Court made reference to the case in connection with the statement: "\* \* \* we have declined to regard mere gross receipts as a sound measure of going concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume" (347 U. S. 367).

The Court cited no other authority for the proposition, and the Appellee respectfully submits that the *Glue Company* case is not such authority.

The issue before the Court in the *Glue Company* case was the validity of a net income tax, not a gross receipts tax. Concerning the *Glue Company* case, Mr. Justice Black, in a dissenting opinion in *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. Ed. 272, had this to say:

"It was not until the decisions in the cases of *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 296, 62 L. Ed. 295, 298, 38 S. Ct. 126; and *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 62 L. Ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748, decided in 1917

and 1918 respectively, that this court first tentatively announced, *by way of dicta* a rule condemning State taxes based on gross receipts from interstate commerce." (Emphasis added)

"The full blown rule under which the Federal Courts strike down generally applied non-discriminatory State taxes measured by gross receipts from interstate commerce ripened into its present expanded form only eight months ago. (*J. D. Adams Mfg. Co. v. Storen*, May 16, 1938. (304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429.)) This recent judicial restriction—still less than a year old—on the power of the states to levy general gross receipts taxes, cannot be justified or validated by claiming prestige from advanced age."

Even the "expanded rule" of the *Adams* case referred to by Justice Black is not broad enough to invalidate the tax in the statute here involved, for in the *Adams* case the Court, speaking through Mr. Justice Roberts, said "The vice of the statute \* \* \* is that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce; \* \* \*." "Interstate commerce would thus be subject to the risk of a double tax burden to which intrastate commerce is not exposed \* \* \*" (304 U. S. 311, 82 L. Ed. 1369).

The burden of this portion of the Appellant's argument is that a direct tax on gross receipts does not measure property values and, therefore, simply is not a property tax.

Appellant has also cited *Southern Railway Company v. Kentucky*, 274 U. S. 76, for this proposition, and it is clearly not in point.

Even the decision in the prior appeal between the parties herein is not authority for the proposition. If, in fact, the court had ruled, on the prior appeal, that every tax on a business engaged solely in interstate commerce and meas-

ured by gross receipts is void, its opinion would, we submit, have been much different. The prior taxing statute was held unconstitutional as applied to the Appellant, not because it was a gross receipts tax, but because the Court said it was a privilege tax. The Court used the fact that the tax was measured by gross receipts as *one* of the indications that it was a privilege tax, but, as has already been noted, there were numerous other indications. The Court did not say "the fact that its measure is gross receipts invalidates the tax." Instead, the Court said "the fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, *just as the Legislature indicated.*" (Emphasis added) The ultimate effect of the Appellant's argument is that every tax measured by gross receipts, whether apportioned or not, is a privilege tax, and hence, as applied to one engaged solely in interstate commerce, void. The Court has not so held; indeed, this Court has repeatedly expressed itself to the contrary.

In *Western Live Stock v. Bureau of Internal Revenue*, 303 U. S. 250 (1938), this Court, speaking through Mr. Justice Stone, said:

"\* \* \* Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; *Maine v. Grand Trunk Railway*, *supra*; *Cudahy Packing Co. v. Minnesota*, *supra*; *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, *Fargo v. Michigan*, *supra*; *Galveston, H. & S. A. R. Co. v. Texas*, *supra*; *Meyer v. Wells, Fargo & Co.*, *supra*,

with which compare *Wisconsin & M. R. Co. v. Powers*, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine v. Grand Trunk Railway*, supra; *Ficklen v. Shelby County Taxing District*, supra; *American Manufacturing Company v. St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co. v. Minnesota*, supra; *United States Express Company v. Minnesota*, supra; cf. *Postal Telegraph Cable Co. v. Adams*, supra; see *McHenry v. Alford*, 168 U. S. 651, 670, 671, 18 S. Ct. 242, 42 L. Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. \* \* \*

(303 U. S. 256)

As recently as the case of *Interstate Oil Pipe Line Company v. Stone*, 337 U. S. 662 (1949), this Court has approved the doctrine of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 (1891), which sustained a tax on an interstate railroad corporation which was "an annual excise tax measured by apportioned gross receipts for the privilege of exercising its franchises in this State" (337 U. S. 667); and while there may be disagreement as to whether the tax in the *Grand Trunk* case was sustained on the ground that it was imposed in lieu of *ad valorem* taxes as Mr. Justice Holmes explained in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. Ed. 1031, we have never seen any case in which it has been suggested that such holding would have been contrary to any decision of this Court. But, the Appellant's argument would mean that the tax in the *Grand Trunk* case was incapable of such interpretation because it was measured by gross receipts.



In its brief before the State Court, the Appellant asserted that *Western Live Stock* is not pertinent to the argument we make here because it involved a privilege tax, not a property tax. We cited the language of the Court in that case as the Court's understanding of its prior rulings. Appellant has cited no case in which the Court has said "A tax which has as its measure gross receipts is a privilege tax and can never be a property tax." That is what the Appellant asserts, but Mr. Justice Stone, speaking for the Court, in *Western Live Stock* thought differently:

"Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has ~~held~~ that local taxes may be laid on *property used in the commerce*; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former." (303 U. S. 259, 82 L. Ed. 830) (Emphasis added)

We reserve for full discussion later the fact that by means of the Virginia Company the Appellant indirectly conducts an intrastate business in Virginia, but we point out here, in connection with the quoted statement from *Western Live Stock*, that the evidence is uncontradicted that *THE APPELLANT'S PROPERTY AND ITS EMPLOYEES ARE ENGAGED IN INTRASTATE COMMERCE* by the Virginia Company, which is wholly *owned and controlled* by the Appellant, and that the Appellant receives valuable consideration for permitting its property to be thus engaged in intrastate commerce.

In the *Cudahy Packing Co.* case, *supra*, the statute involved required the company "to report annually its gross

earnings from the operation of its car line within the State, and to pay, in lieu of other taxes on the property so employed, a tax fixed at a stated per cent of such earnings" (246 U. S. 452). Although the earnings thus reached were "derived largely from interstate commerce" this Court held the tax to be a property tax.

We do not understand the law to have changed.

### C.

#### INTERPRETATION OF THE VIRGINIA STATUTE IN THE LIGHT OF THE STATE CONSTITUTION

The Appellee recognizes the power of this Court to examine for itself the nature and effect of the tax here involved. In doing so, however, this Court should look at the tax in conjunction with the State's "scheme of taxation".

As to the State's system of taxation, the Supreme Court of Appeals of Virginia had this to say:

"As stated by the Commission in its opinion, it has been the policy of Virginia since the adoption of its present Constitution in 1902 to impose franchise taxes measured by gross receipts instead of income taxes on public utilities. The Constitution itself (§ 177) imposed the tax on railroads and the tax on other companies was left to the legislature. When the proposed system was submitted to the Convention which formulated the Constitution, its Committee on Taxation and Finance reported in part:

" \* \* \* The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at; \* \* \*. \* \* \* If that be done, if you get at all of the property, its personal property and its real estate, its tangible,

invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. \* \* \* Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857.

"Consonant with the Committee's purpose, §170 of the Constitution adopted by the Convention provides that the General Assembly 'may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property'. (Emphasis added.)" (199 Va. 597)

The Committee on Taxation and Finance went further, and it is clear, from the statement of the spokesman for the Committee, that they considered a tax measured by gross receipts to be the only proper way of reaching the property value inherent in a going concern. He said:

"As I have said, we looked around to see if we could find a principle that would do justice, and in looking around we found that *as we could not find out the material value of this property, like you find out the value of a house, we would provide for some method of estimating it, and we would leave it to the State authorities to exercise it.*

\* \* \*

"I repeat that you cannot get at the value of this property like you can get at the value of my real estate. There is but one way of looking at my real estate, and that is to see what its market value is. *But you cannot ascertain the market value of a railroad bed. We could*

*not apply, therefore, the principle that you would apply to the ordinary classes of property owned by individuals.*" (Italics supplied) (Debate of the Constitutional Convention of Virginia, 1901-2, II, p. 2677)

In the State court, Appellant seriously contended that Section 170 of the Virginia Constitution did not authorize the imposition against it of the tax here involved. The Court decided adversely to that contention. The language of Section 170 standing alone would seem to compel the conclusion that a "franchise tax" imposed under it is a property tax in lieu of taxes upon other property.\* The pertinent portion of the section is as follows:

"The General Assembly \* \* \* may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial or commercial corporation."

The use of the word "other" in the Constitution is one compelling "characterization" of a tax imposed thereunder as a property tax.

Appellee has consistently maintained throughout this litigation that this section is pertinent in determining the incidence of the tax levied by the Legislature. When it is considered in the light of the fact that the prior tax was ruled unconstitutional because it was a "privilege" tax, it becomes doubly significant and it is absurd to conclude that the new tax is anything other than an effective effort on the part of the Legislature to utilize the power given it under this section of the Constitution.

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\* For full text of Section 170 of the Constitution of Virginia, see Appendix.



Indeed, counsel for the Appellant admitted before the State Corporation Commission that such was the intent of the Legislature when he said:

"No, I think the Legislature meant to do what it was saying, that is, invoke the Constitution. Under the Constitution it may impose a franchise tax and make it in lieu of taxes on other property." (R. p. 21).

At the time of the prior appeal, the Appellant argued, on page 28 of its brief, that it was the legislative intent to levy "a *privilege* rather than a *property* tax."

#### D.

#### INTERPRETATION OF THE VIRGINIA STATUTE IN THE LIGHT OF THE STATE'S ADMINISTRATIVE INTERPRETATION

The Supreme Court of Appeals of Virginia pointed out in the paragraph of its opinion quoted under Section A herein that in assessing the tangible property of a public service corporation the Commission is required to exclude "going concern value", and tax only the "bare bones" (*supra*, p. 15).

Even under the prior tax, which was held to be a privilege tax, the law of Virginia has been administered in that manner. This will be revealed in Section E hereof in quotations from earlier cases in Virginia, but the 1941 Annual Report of the State Corporation Commission contained the following paragraph, which leaves no question as to the thinking of the administrative body itself:

"Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded

of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.' " (193 Va. 70)

### E.

#### PRIOR DECISION IN VIRGINIA

In the dissenting opinion written by Mr. Justice Clark on the prior appeal, it is recognized that the expressions of the State Court, and those of the State Corporation Commission, on this subject were perfectly consistent with the determination that the tax was a property tax. It was noted that some of the decisions antedate *Spector Motor Service, Inc. v. O'Connor, supra*.

It seems hardly necessary to do more than set forth here statements from two such earlier decisions.

In *City of Richmond v. Commonwealth*, 188 Va. 600, 50 S. E. 2d 654, decided in 1948, the opinion of Court made it clear that the system of taxation existing in Virginia envisioned a tax on "going concern value" measured by gross receipts, and that such value was not subject to dual taxation. The Court explained the operation of the tax by quoting from the views of two former State Corporation Commissioners.

" \* \* \* It will be noted that in assessing these properties the Commission is expressly forbidden by the Constitution to include any franchise value in the assessment of the physical properties for taxation. \* \* \* " (188 Va. 632)

\* \* \*

" The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical prop-

erties of the railroad company *exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible value of the company."* (Italics supplied) (188 Va. 624)

"\* \* \* In brief, the plan existing today, which is common to all such companies, provides for the imposition of *ad valorem* taxes by the several localities in the State upon the tangible properties of such companies. These taxes are imposed on the basis of assessments made or valuations fixed by the Commission. A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property.'" (188 Va. 619)

The case of *Commonwealth v. Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137, was so clearly analogous to the prior appeal between the parties here that the Appellant here filed a brief *amicus curiae*.

In that case, after reviewing the principles laid down by this Court with respect to such taxes, the Virginia Court considered the question of whether that tax (and, since the Appellant was before the Court *amicus curiae* the Court also expressly dealt with the tax on express companies) was a license tax and concluded:

"Certainly section 58-575 does not impose a license tax in the sense that its payment is a prerequisite to the right to operate vessels in the navigable waters of the United States. It does not impose a tax on the privilege of navigation. The payment of the tax is not made a condition precedent to the right to carry on the busi-

ness, as was the case in *Moran v. New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653, and *Harman v. Chicago*, 147 U. S. 396, 13 S. Ct. 306, 37 L. Ed. 216. It provides no criminal sanctions, but its enforcement is left to the ordinary means devised for the collection of taxes, *Postal Tel. Cable Co. v. Adams, supra*.

"Baltimore has been paying a tax on receipts from business 'beginning and ending in Virginia' every year since 1915, but no license has ever been issued to it and the procedures prescribed in Article I, Chapter 7 of Title 58 for obtaining licenses have not been followed. 'But where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.' *Charlottesville v. Marks' Shows, supra*, 179 Va. at p. 329, 18 S. E. (2d) at p. 894.

"If not a license tax, is it a tax on property or the equivalent of a tax on property?" (193 Va. 68)

Turning its attention to its own question, the Court said:

"In *Richmond v. Commonwealth*, 188 Va. 600, 619, 50 S. E. (2d) 654, 663, the opinion of the State Corporation Commission in that case is quoted to the effect that our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of public service corporations, common to all such companies, and providing for the imposition of *ad valorem* taxes by the several localities in the State, on the basis of assessments or valuations fixed by the Commission. 'A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property.'



"We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

"The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible" value of the company."

"Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

"Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%."

"It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the bare bones,' to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co. v.*

*Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause." (193 Va. p. 69)

These decisions should make it clear that there is present no effort on the part of Virginia to merely avoid the adverse economic effects of the prior appeal by a change of language. Virginia has consistently sought to reach this intangible property. This Court said it failed before due largely to the choice of words. The words were changed (and we submit the legal effect necessarily changed also), but the objective of Virginia did not change. The objective was and is—a property tax, measured by gross receipts.

## F.

### THE OPERATION OF THE STATUTE

In determining whether this is a license tax or a property tax, it would seem that it would be helpful to examine the operation of the statute in the light of certain of the decisions of this Court.

The tax in question is not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means devised for the collection of taxes (see Section 58-554, at page 31 of Appellant's brief). The tax, therefore, meets the test of *Postal Tele. Cable Co. v. Adams*, 155 U. S. 688.

The important element of *Maine v. Grand Trunk Ry. Co.*, *supra*, as referred to in the *Galveston* case, *supra*, was:

"\* \* \* the fact that the scheme of the statute was to establish a system. The buildings of the railroad and

its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. The idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. \* \* \*." (210 U. S. 226)

The tax in question is a part of an identical system. Indeed, Appellant argued on the prior appeal that such taxes in Virginia copied that system.

The tax in the *Galveston* case was condemned because it was an attempt to reach receipts reached by another tax on the property that included going concern value, but in *United States Exp. Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, this Court sustained the tax because it was "the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction."

The tax involved is the only tax in Virginia that reaches going concern value of *such property*.

Other taxes have been condemned because they permitted the possibility of a cumulative burden by the imposition of a similar tax on the same property by numerous states. But when, as here, the tax is "fairly apportioned to its use within the state" that vice is not present. *Western Live Stock, supra*.

There is absolutely no question but that this tax is substituted in lieu of taxes on all other intangible property and all rolling stock. Such taxes have been approved time and again, *Cudahy Packing Co. v. Minnesota, supra*.

In addition to these criteria there are two additional cir-

cumstances present in this case which the Court was not called upon to consider on the prior appeal:

(1) All of the property of the Appellant is used in intrastate commerce by the Virginia Company under a contract with that Company, and the Appellant is compensated for permitting such use of its property.

(2) The Appellant totally owns and controls the Virginia Company which is engaged in intrastate commerce and the property of the Virginia Company is used by the Appellant in interstate commerce.

## II.

### The Amount of the Tax

The Appellant contends that even if, contrary to its belief, the tax under attack is a property tax, it denies due process of law because of the "method of apportioning Appellant's gross revenues" and because it is no "just equivalent of the tax in lieu of which it was imposed."

These assertions are made against the "amount" in spite of the fact that Appellant failed or refused to report in Virginia the amount of its receipts earned from business passing through, into or out of the State. On its return where that information was requested the Appellant answered "NONE" and appended a statement to the effect that it had no way of making such determination. As a result of this report the State Corporation Commission of Virginia invoked the provisions of Section 58-549 of the Code of Virginia and proceeded to determine the tax based on the "best and most reliable information" available. This is an accepted tax practice in federal as well as state taxes. Its need seems obvious.

The taxpayer is thus in the position of saying "I kept no



records, I can't report, but your result is wrong."

It should be remembered that as a result of a change since the prior appeal the mileage formula was not a part of the statute, and was only invoked because the taxpayer failed to properly report.

The Commonwealth's position was aptly stated in the State Court's opinion:

"Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross receipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. \* \* \*

"\* \* \* For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The commission thereupon ascertained in the best way it could the amount of these gross receipts to be \$6,499,519. *If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility of an agreement about it as in prior years. (Railway Express Agency, Inc., v. Commonwealth, 194 Va. 757, 75 S. E. 2d 61.)*

*"There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as prima facie correct, Constitution § 156 (f). It is not incredible that a property which produced gross earnings of \$6,000,000 in one year would have a value of that much." (Emphasis added) (199 Va. 589)*

The failure of the Appellant to produce evidence in the State tribunals to support its claim is ample reason for this Court to refuse to review the question, particularly where, as here, adequate remedy for the correction of excessive assessment is available and has not been resorted to in the State Courts.

As the State Court noted, the Appellant has produced no evidence "as to the relation between the company's property and its revenues in other states." (199 Va. 601) In spite of this fact it now seeks to demonstrate mathematically that the tax is excessive.

Even if there were such evidence in the record, the fallacy of a statistical approach is immediately apparent. In Virginia, Appellant enjoys the joint use of property with the so-called Virginia Company. With regard to its property located in Virginia, by merely placing title to all its tangible personal property, office furniture, equipment and real estate in the Virginia Company—which it wholly owns and controls—the Appellant could realize the same earnings in Virginia and have an even smaller percentage of its total property Virginia owned. One big asset of the Appellant

is the Virginia Company. The joint use of trucks, buildings, employees, etc., makes it easy for Appellant to earn tremendous sum in Virginia without the ownership of tangible property.

The claim that 1.7% of its revenues was derived in Virginia the Appellant brands as "unrealistic", but the evidence showed that the total mileage covered by the Appellant by rail, steamboat, motor carrier or miscellaneous was 306,624, and that 6,118.90 miles of that is in Virginia. Over 1.9% of its total mileage is in Virginia. How can it be unrealistic to say that 1.7% of its revenue was derived in Virginia?—Express companies make money on the basis of the mileage involved, not on the basis of the value of the tangible property owned, and the contract right to move express over these 6,118.90 miles is valuable property, especially so when over most of the mileage the Appellant enjoys an absolute monopoly. Even the Appellant concedes this to be valuable property!

Appellant further sought to demonstrate mathematically that it had no property on which a tax could be levied in an amount sufficient to support this "in lieu" tax, and that the going concern value attributed to its properties is so disproportionate as to "over-tax our credulity". It does so by the simple device of assuming for purpose of computing going concern value a false tax rate of  $\frac{1}{2}$  of 1% (50¢ on \$100.00 in value).

Where does Appellant find this tax rate of 50¢ on \$100.00 in value? It is not a part of the scheme of taxation applicable to express companies. This same illustration was used by Appellant and the Court on the prior appeal, but with some propriety, for at that time the intangible property of express companies was taxed at that rate. The statutes have been amended, and the rate selected by Appellant is merely an assumed rate. Why should we not assume a rate of \$5.00

per \$100.00 in value? If we assume such rate the property value necessary to produce tax of \$139,739.66 would be only \$2,794,793.20. Obviously, by *assuming* a tax rate we can arrive at any value we desire.

The statute calls for a tax "equal to two and three-twentieths per cent of the gross receipts." If we assume 2.15% (two and three-twentieths) or \$2.15 per \$100.00 in value to be the "rate", obviously the "value" required to produce the tax will be \$6,499,519. This is apparently the interpretation placed on the tax by the Virginia Court when it said "It is not incredible that a property which produced gross earnings of \$6,000,000 in *one* year would have a value of that amount." Certainly the statement is economically sound. The purchase of rental property for a price equal to one year's gross rent would be a sensational bargain! The Appellant asks the Court to *assume* the value prescribed is too great—it has not attempted to prove the fact with evidence.

No good purpose would be served of here arguing what even the Appellant apparently admits, to-wit: property used as a part of a going concern acquires an intangible property value over and above the value of the tangible property. The Appellant merely seeks to illustrate that it has so little tangible property that it cannot have such great intangible value. But a great part of the value of the Appellant's property comes about by virtue of contract rights of great value. These contract rights are intangible property.

Appellant has two such items of intangible personal property about which it has had little to say. It appears from the record that it owns a contract with the Virginia Company by which it has the privilege of using in Virginia that company's property and employees, and receive all its revenue. In fact, it owns all the stock in the Virginia Company. These are valuable properties. It also appears from the record that



the Appellant *owns* a contract which entitles it to the exclusive express privilege on 177 railroads in the United States and express privileges on a number of truck lines, air lines and steamboat lines. Many of them operate in Virginia. What is the value of this "intangible" property?

This we do not know. We do know that based on the proportion of Virginia mileage to system mileage the privilege on the six major railroads and five air lines, earned gross revenues in Virginia of \$6,499,519 in one year. The Legislature has concluded that only by determination of revenues can we reach the going concern value of such a corporation's property. We must assume that in fixing the rate of tax the Legislature was well aware that it was levying a tax to be measured by gross receipts rather than net income, and that it set the tax rate much lower than would have been the case if they had been basing the tax on net income.

The ownership by the Appellant of these exclusive contract rights with the Virginia Company and various carriers in Virginia could be made the subject of a contract tax in Virginia. However, Virginia in the exercise of its discretion has determined to impose a franchise tax measured by gross receipts "in lieu" of such a tax on this and other intangible property and on rolling stock. This action of the General Assembly has been found by the State Corporation Commission and the Supreme Court of Appeals of Virginia as being consistent with the intent and purpose of the State Constitution, and further both of these judicial bodies have found the operation of the tax inoffensive under the Constitution of the United States.

### III.

#### The Appellant's Activities in Virginia

The Appellant's first argument is devoted to the point that

doing no intrastate business in Virginia it cannot be subjected to a privilege tax in Virginia. That was the rule of the prior appeal.

The evidence in this case reveals that the Appellant permits its property to be used in intrastate commerce in Virginia by its wholly owned subsidiary, and for that use it receives all of its subsidiary's receipts. In addition, it is clear that it, and its subsidiary, use the same facilities, the same equipment, the same supplies, even the same bills of lading. The employees are "joint employees". The Appellant pays or bears all costs or expenses including all operating expenses of the Virginia Company. In other words, the Appellant totally owns the Virginia Company, receives all its revenues and pays all its bills. Certainly, it is clear that the Virginia Company is merely a corporate shell admittedly created to satisfy Section 163 of the Constitution of Virginia. These facts were not considered by this Court in the prior case, and distinguish this case from the prior decision.

The Appellant has contracts with various carriers under which it is obligated to perform services *intrastate* in Virginia. Under its contract with the Virginia Company that company is required to "perform all of the obligations of the Delaware Company imposed by contracts between the latter company and such carriers concerning *intrastate* operations in Virginia." In performing these services, the Virginia Company is permitted to use the property of the Appellant — all revenue is transmitted to the Delaware Company.

The Commonwealth earnestly submits that this "unity of use" would justify a privilege tax against the Appellant. In making this suggestion the State should in no wise be considered as having indicated a desire or intention to levy such a tax. The State's scheme of taxation envisions a property tax in this situation. That is what the Legislature has

sought to levy. However, should this Court again conclude that it is in reality a privilege tax, we respectfully suggest that it is, on the peculiar facts of this case, clearly distinguishable from *Spector*.

That such a tax here would not be discriminatory, unfair or burdensome can be illustrated by the following example:

Two express shipments are made on the same day by the same shipper in Richmond. They are delivered to the same employee, who is the joint employee of both companies. One is destined for Bristol, Virginia, one for Bristol, Tennessee—just across the Virginia State line. The packages are handled by the same employees and transported in the same truck or railroad car. Obviously, they each receive the same protection and service from the State. Can it be seriously contended that a tax on the Bristol, Tennessee shipment would amount to a discriminatory burden on interstate commerce when the intrastate shipment is thus taxed? It is obvious that, contrary to being discriminated against, if Appellant escapes liability under this tax, it enjoys an advantage over intrastate carriers.

It is true, as Appellant has repeatedly urged, that Section 163 of the Virginia Constitution forbids it to do intrastate business in Virginia. But the Virginia Constitution does not require Appellant to "lease" its equipment for such use by another or to enter into contracts with carriers obligating it to perform intrastate services in Virginia, which it "farms out" to its subsidiary. Apparently the Appellant does not think the Virginia Constitution forbids such actions on its part. For our part, we submit that when the Appellant by contract permits its property to be used intrastate in Virginia for compensation it submits that property to taxation in Virginia, and itself for taxation of the privilege of such

intrastate activities. This phase of the Appellant's activities, it appears to the Commonwealth, brings it squarely within the scope of *Cudahy Packing Co. v. Minnesota, supra*, which is cited with apparent approval even in *Spector*. In *Cudahy* a tax was levied by Minnesota against an Illinois corporation, based on its gross receipts on mileage in Minnesota from a contract with various railroads, under which contract Cudahy supplied refrigerator cars to the railroads for compensation. The property was used by another corporation in both intrastate and interstate commerce. The tax was sustained.

## CONCLUSION

The Constitution of Virginia, the administrative interpretations, judicial decisions, and now the language and admitted intention of General Assembly all indicate that the present tax is a property tax. In operation it appears to be such. It is non-discriminatory, fairly apportioned and has not been shown to be excessive. The activities of the Appellant in Virginia subject it to taxation therein. For these reasons, the Appellee respectfully submits that the judgment appealed from should be affirmed.

Respectfully submitted,

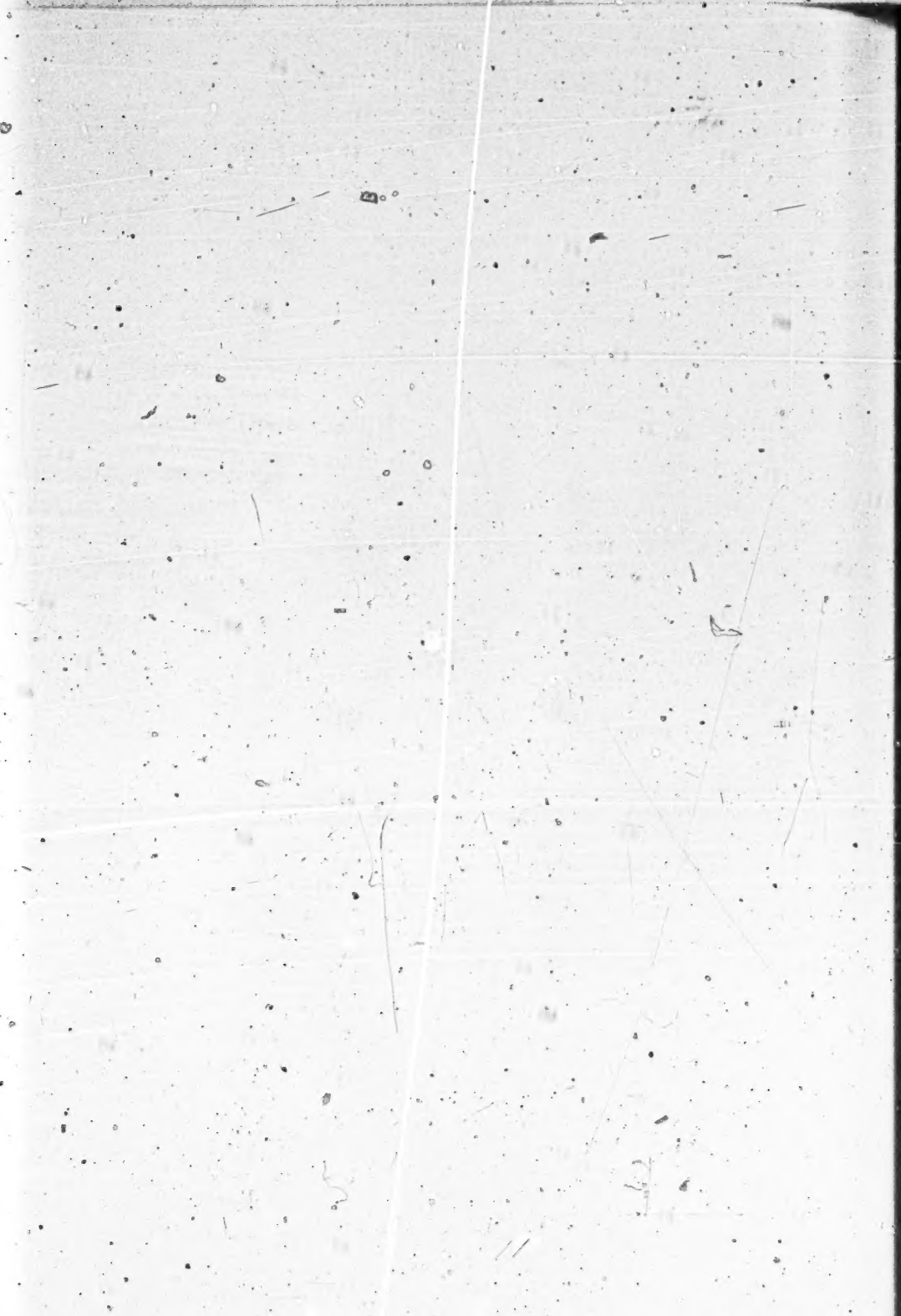
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## APPENDIX



## Constitution of Virginia

“§ 170. *Income, license and franchise taxes; paving and sewer taxes; abutting land owners.* — The General Assembly may levy a tax on incomes in excess of six hundred dollars per annum; may levy a license tax upon any business which cannot be reached by the ad valorem system; and may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation. Whenever a franchise tax shall be imposed upon a corporation doing business, in this State, or whenever all the capital, however invested, of a corporation chartered under the laws of the State, shall be taxed, the shares of stock issued by any such corporation shall not be further taxed. No city or town or county having the right, under this section, to impose taxes or assessments for local improvements upon abutting property owners shall impose any tax or assessment upon abutting landowners for street or other public improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting landowners. Except in cities and towns and counties having a population greater than five hundred inhabitants per square mile as shown by the United States census, no taxes or assessments, for local public improvements, shall be imposed on abutting landowners.